No. 121.

Bf. of Ladd & Hagerman for P. E.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1901.

Filed Oct. 24, 1901.

FREDERICK HOWARD, JAMES L. LOMBARD and JOHN C. GAGE, *Plaintiffs in Error*,
vs.
THE UNITED STATES to the use of DAVID D. STEWART, *Defendant in Error.*

No. 121.

In Error to the Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR PLAINTIFFS IN ERROR.

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STATEMENT.

This proceeding in error seeks to reverse the action of the Circuit Court of Appeals for the Eighth Circuit affirming the judgment of the Circuit Court of the United States for the Western Division of the Western District of Missouri. In the latter court a petition (Rec. 3, 4) was filed in the name of "The United States to the use of David D. Stewart" as plaintiff against Frederick Howard, James L. Lombard, John C. Gage and Witten McDonald, as sureties upon the bond of Warren Watson as former clerk of that court. Because of his discharge in bankruptcy the case was dismissed as to Witten McDonald (Answer and Stipulation, Rec.

15; Judgment, 16; Finding, 20) and judgment (Rec. 16) rendered against the other sureties, Howard, Lombard and Gage, the case having been submitted upon an agreed statement of facts (Rec. 11-14), a written stipulation (Rec. 11) having been filed waiving a jury. Judge Adams as the trial judge delivered a written opinion (Rec. 23-28), which is reported in 93 Fed. Rep. 719. A writ of error was sued out by plaintiffs in error (Rec. 1, 2, 20, 21) to the Circuit Court of Appeals, where the judgment was affirmed (Rec. 41), the opinion (Rec. 31-40) delivered by Judge Caldwell being reported in 102 Fed. Rep., 77; 42 C. C. A., 109). A writ of error to the Circuit Court of Appeals was allowed by Mr. Justice Brewer and the case thus brought to this court (Rec. 41-45).

The special findings of fact (Rec. 16-20) upon which the judgment was rendered read:

"This cause came on for hearing on the written stipulation of the parties waiving a jury, and upon an agreed statement of facts, and a separate stipulation as to defendant Witten McDonald. No other testimony was offered in the case.

Thereupon the court, sitting as a jury, does, in accordance with said agreed statement of facts, and at the request of the counsel for the defendants, specially find the facts herein as follows:

1. Upon March 3, 1887, Warren Watson was appointed clerk of the United States Circuit Court for the Western Division of the Western District of Missouri, and acted as such from that date until his death, which occurred on the 24th day of March, 1892.

Upon March 3, 1887, said Warren Watson, with these defendants, executed his bond as such clerk in words and figures as follows: 'Know all men by these presents: That we, Warren Watson, Frederick Howard, John Cutter Gage, James Lewis Lombard, Witten McDonald, of the City of Kansas, in the County of Jackson, State of Missouri, are held and firmly bound unto the United States of America in the sum of twenty thousand dollars lawful money of the United States, to be paid to the said United States, for

which payment, well and truly be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Signed with our hands and sealed with our seals this 3rd day of March, 1887.

The condition of the above obligation is such, Whereas the said Warren Watson has, pursuant to law, been appointed to be clerk of the circuit court of the United States for the Western Division of the Western District of Missouri, as by order of appointment bearing date the 3rd of March, 1887, and recorded on page 70 of Book Law D of the records of said Court will more fully appear.

Now, if the said Warren Watson, by himself and by his deputies, shall faithfully perform all the duties of the said office of clerk, and seasonably record the decrees, judgments and determinations of said court, then this obligation to be void; otherwise to remain in full force and virtue.

WARREN WATSON, [Seal]
FREDERICK HOWARD, [Seal]
JOHN CUTTER GAGE, [Seal]
JAMES LEWIS LOMBARD, [Seal]
WITTEN McDONALD, [Seal]

Approved: A. KREKEL, Judge.'

This is the same bond mentioned in the petition and copied in the answer, and was the only bond ever executed by defendants or on behalf of Watson as such clerk. It was at the time of its execution approved by A. Krekel, a then judge of said court, who endorsed his approval thereon, and each of the parties to said bond qualified in writing as to the amount of property owned by each, which qualification was filed with said bond.

2. Warren Watson was a resident of Jackson county, Missouri, and while still acting as such clerk died on the 24th day of March, 1892, and on the 2nd day of April, 1892, Fred. W. Perkins was by the probate court of said county duly appointed as his administrator and as such, on the 5th day of April, 1892, gave the notices required by the statutes of Missouri for the presentation of claims against said Watson's estate. On the 11th day of September, 1894, said estate having been completely administered upon, was closed and the administrator discharged. At no time did the United States, or David D. Stewart, the relator, ever exhibit or pre-

sent any demand or claim against said estate in said probate proceedings, or as provided by the laws of Missouri for exhibiting or presenting claims against the estates of decedents.

The amount of demands allowed against the estate of said Warren Watson and assigned to the fifth class is $2630.-91, and on this sum there was paid a dividend of .0331 per cent or in the aggregate $90.41 and no more.

3. On February 6, 1891, the relator, David D. Stewart, as plaintiff, instituted in said United States Circuit Court his suit at law against Henry county, Missouri, in which his causes of action were set forth in a petition containing three counts, the first asking a judgment for $1010.00 with interest from the 1st day of September, 1887, on a bond of defendant for $1000.00 dated July 1, 1882, payable at the National Bank of Commerce of New York on July 1, 1892, with six per cent interest, evidenced by coupons, but at the option of the county the bond was payable at any time after July 1st, 1887. The second count was upon a similar bond for $1,000, and the third count was on a like bond for $500.00.

On March 3rd, 1891, defendant, Henry county, filed in said cause its answer; said answer as to each of the first and second counts being that on September 6th, 1887, there was due on said bond $1,010.00, and on that date it deposited that sum in the National Bank of Commerce of New York, for the payment of the bond and interest, and on September 6th, 1887, tendered that sum to the plaintiff as full payment of the bond and interest thereon, but plaintiff refused to accept same 'and defendant says it has at all times been ready and willing to pay plaintiff said sum of $1010.00 in full payment of said bond and unpaid interest, and now here again tenders to plaintiff said sum of $1010.00 in full payment of said bond and unpaid interest due thereon, on September 6th, 1887, and now brings the said sum into court.' The answer to the third count was exactly the same except that the amount named was $505.00 instead of $1010.00.

Upon March 3rd, 1891, there was entered on the records of said court in said cause the following:

'This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the

clerk the sum of $2525.00 in payment and satisfaction of his cause of action in the petition set forth. Thereupon a stipulation waiving a trial by jury is filed herein.'

On June 27th, 1891, the plaintiff in said suit filed his reply, which was a general denial.

On July 2, 1894, there was entered on the records of said court in said cause the following:

'This day come the parties by their attorneys, the plaintiff by Karnes, Holmes & Krauthoff, and the defendant by M. A. Fyke, and a stipulation waiving a jury having been heretofore filed herein, the hearing of this cause is proceeded with before the court. Thereupon evidence is heard and the case is submitted to the court and by the court taken under advisement with leave to the parties to file briefs.'

On February 11, 1895, there was entered on the records of said court in said cause the following:

'A jury having heretofore been waived in writing by the parties hereto, and this cause having been submitted to the court on the pleadings and evidence and argument of counsel, and taken under advisement by the court, and the court being now fully advised in the premises, doth find the issues as follows, to-wit: On the first count of the petition the court finds that the principal and interest on Bond No. 204 was duly tendered by defendant at the place of payment on the first day of September, 1887, and that after the plaintiff instituted this action in this court and at the filing of the answer herein, the defendant duly paid said sum into court for the use and benefit of plaintiff and that plaintiff is entitled to judgment therefor on the first count of the petition in the sum of $1,010 00.'

(The findings as to the second and third counts are precisely similar except as to the amounts, the second count being $1010.00 and the third $505.00).

'It is therefore ordered and adjudged by the court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2,525.00), the aggregate amount found to be owing to him under the three

counts of the petition, and that plaintiff pay the costs of this action and that execution issue therefor.

And it further appearing to the court that the said sum of $2,525.00, so paid into court as aforesaid, was paid to and received by Warren Watson, the then clerk of this court, who has since departed this life without having accounted for said sum of money so received by him as said clerk, and that said money has never been turned over to his successor in office, the present clerk of this court, nor has the same been otherwise accounted for by said Warren Watson as clerk, or otherwise. It is found and adjudged by the court that the plaintiff is entitled to have and recover said money so received by said Warren Watson as clerk aforesaid, and plaintiff is authorized to proceed therefor on the bond of said Warren Watson given as clerk as aforesaid.' No appeal was taken from this judgment, and the same has become final and remains in full force and effect and unpaid.

4. On March 3rd, 1891, Henry county did hand to Warren Watson the sum of $2,525.00 as in said entry of that date recited.

No order or direction of the court as to this money was ever made, had or obtained, and no entry in reference to the same was ever made, except as set out in paragraph 3.

When the $2,525.00 was so paid to said Warren Watson, he on the same day deposited the same in a bank to his own credit, and at no time did he treat the money as in the depository of the court. He never at any time presented any account to the court of such money, and has never paid it to Henry county or David D. Stewart, and never during the pendency of the suit of *Stewart v. Henry County* did either party take any steps towards having any order made in relation to the said money other than was actually made, nor make any objection to the method in which said money was received.

David D. Stewart had no knowledge of said acts of Warren Watson.

5. At no time was demand made on these defendants or Warren Watson for said money other than is to be inferred from the institution of the suit.

The court further finds that the defendant, Witten McDonald, has been discharged of any obligation on his part to the plaintiff by reason of a discharge duly granted him by the United States District Court for the Southern Division of the Eastern District of Missouri in bankruptcy; that said discharge was duly granted and said proceedings duly had.

Upon the finding of facts above made the court concludes as a matter of law that the relator is entitled to judgment against the defendants, Howard, Gage and Lombard, for the sum of $2,525.00, with interest at six per cent from the date of the filing of the petition herein, October 19th, 1895, a total of $3,057.77, and that defendant, Witten McDonald, is entitled to judgment in his favor.

Dated Kansas City, Missouri, April 26, 1899.

(Signed) ELMER B. ADAMS, Judge."

The errors here assigned (Rec. 41) and relied upon are:

"The circuit court of appeals for the eighth judicial circuit erred in each of the following respects:

1. In affirming the judgment of the circuit court herein.

2. In holding that upon the finding of facts judgment should be rendered against them.

3. In holding that the suit could be maintained in the name of the United States to the use of Stewart.

4. In holding that the sureties on the bond of the clerk of the circuit court were liable for the moneys of a private party deposited under the circumstances set out in the finding of facts."

ARGUMENT FOR PLAINTIFFS IN ERROR.

I.

The Statutes of the United States Required Bonds to be Given by the Clerks of the Circuit Courts Solely for the Protection of the United States and not at all for the Protection of Private Parties.

(*a*) *The bond here is the statutory bond.*

About this there has been, and will be, no dispute. The statutes of the United States (18 U. S. Stats., 1333; Sup. Rev. Stats. (2nd Ed.), 65; Rev. Stats. Sec. 795) provide that the clerks of the supreme court and the circuit and district courts, respectively, shall each give bonds of a prescribed form, and the bond in this case was of that form. The bond, therefore, was a statutory bond, and created the statutory liability and none other.

(*b*) *The general rule supported by authority.*

The general rule on this subject is stated in Murfree on Official Bonds, Section 504, thus:

"The primary object of an official bond is, of course, to protect the interests of the beneficiary named in it, the state, county, corporation, etc., as the case may be. By statute, however, it is usually provided that bonds given by officers to states and counties shall be available to protect the interests of private persons who may be aggrieved by the breach of such bonds. They cannot be used, however, for these purposes in cases unprovided for by such statutory enactment."

The rule thus announced is abundantly supported by the authorities.

In *State v. Nichol*, 8 Heisk., 657, it was said:

"The bond is given to the state, is intended to enforce the performance of official duties and to indemnify the public against official delinquencies. Such is the plain meaning of its terms and from the nature of the case, unless otherwise directed by statute, would be its object. It certainly was not intended to be operative in favor of individuals for any wrong done to them by the officer."

In a very early Massachusetts case (*Crocker vs. Fales* 13 Mass., 262), brought upon the bond of the clerk of the court of common pleas, in an opinion by Chief Justice Parker it was said:

"The condition of the bond is very general, providing only for the faithful execution by the clerk of his trust, and for the keeping up of the records; and this is in pursuance of the statute of 1786, C. 57, Sec. 3, which provides for the safe keeping of the records. By the statute of 1795, C. 41, commonly called the fee bill, it is made the duty of the clerk to receive the fees of the crier for his use. The bond in suit was given to the county treasurer to secure the faithful discharge of duty by the principal obligor, as clerk of the court of common pleas, and to keep up seasonably the records. It is contended by the plaintiff that this breach is well assigned, because it being made the duty of the clerk to receive the fees of the crier, it was his duty to pay them over, and a failure of that duty upon demand is a breach of the bond. And this would be a just conclusion if we were satisfied that the legislature, in requiring a bond in this form, intended to secure to individuals an indemnity for such omissions by the clerk as would be injurious to them. But, upon duly considering the condition of the bond, and the statute upon which it is founded, we are satisfied that such was not the intent of the legislature. There is nothing in the act which shows a design to protect individual sufferers against the negligence of the clerk to pay over moneys which may come into his hands. The bond is given to the treasurer of the county as the representative, in this respect, of the inhabitants. The penalty is discretionary with the court between fifty and three hundred pounds, the largest of these sums being wholly inadequate if it was intended to cover all the pos-

sible delinquencies of a clerk. There is no mode prescribed by which the indivídal is to maintain an action upon the bond. Nor is there any authority given to the treasurer to deliver over the bond, or even a copy of it, or to pay over the proceeds of a judgment to him who shall cause the suit. Nor is the person, for whose use the action may be brought in the name of the treasurer, made liable to the costs in case the suit should fail. *The damages recovered by any one of ficer might consume the whole penalty*, and the public be left without any of the security which was intended for the preservation of the records. * * * The principles applicable to the bond which is given by a sheriff to the commonwealth are wholly different. * * * Provision is also made for the delivery of a copy of the bond, and for the bringing into court of the original, when an action is commenced upon it at the suit of an individual. Further, there is a provision that he who procures the suit shall pay the costs, if he fail. From all these considerations, we are clear that no breach of the bond sued in this action is alleged; and that the crier, who has sought this relief, must look to the clerk himself for retribution."

An early Virginia case was brought against the clerk of a county court and the sureties on his bond, "which was conditioned that he should duly and faithfully execute his said office, and should not remove or carry, or suffer to be removed or carried, out of the county aforesaid, the records or papers of the said court, or any part thereof, except in cases allowed by law." The law made it the duty of the county courts to collect and account for to the treasurer certain public taxes on houses of entertainment, merchant's licenses, etc. The breach alleged was that the clerk had collected such taxes to the amount of $1,043. and had failed to account therefor. The court held that this form of *official* bond of a clerk covered only his proper duties as clerk to make and keep the records, and not such duties as might be imposed on him by law outside of those clerical duties. President Tucker, in the opinion of the court in that case, said and showed that it had been the practice in Virginia for more than one hundred and twenty-five years to require bonds

with proper special provisions to cover such liabilities, and instanced the case of sheriffs who had at times been required to give three or four different bonds, one for collecting public taxes, another for fines and levies due the commonwealth, and another for collecting and paying officer's fees, executing and returning process, paying all money received, and for due performance, etc., and still other bonds. (*Auditor v. Dryden*, 3 Leigh, 703).

The form of bond required by Section 795 was originally prescribed by the Judiciary Act of September 24th, 1789. (1 *Stat. at Large*, 76). At that time the language thereof had a fixed and well settled meaning recognized by Chief Justice Parker (*Crocker v. Fales*, 13 Mass., 262) and President Tucker (*Auditor v. Dryden*, 3 Leigh, 703), *i. e.*, the condition was not intended as security for private individuals. It is, therefore, to be fairly assumed that Congress did not intend to give any greater effect to the language, but intended to use it in the sense then understood by those learned in the law. It is a rule of construction that where words have a well understood legal meaning, it is to be presumed that the legislature used them in that sense when subsequently adopting a statute. This view is sustained by similar views taken as to bonds, likewise conditioned, where the statute did not expressly give a right of action to individuals injured.

In Texas (*McRea v. Williams*, 58 Texas, 328) in a suit against a mail contractor and the sureties on his contract with the United States by the owner of the letter lost by robbery, committed by one of the contractor's servants, it was held that the bond secured only the United States, and that the sureties were not liable to individuals for their injuries.

In Georgia (*Clark v. U. S.*, 60 Ga., 156) a like ruling has been made. There the suit was in the name of the United States, to the use of the individual complaining,

against the collector of internal revenue and the sureties on his official bond, for the alleged illegal seizure of horses, wagons, etc. The court said:

"The collector's bond sued on by the plaintiff in this case is a contract for the indemnity of the United States alone, and not for the indemnity of private persons who may be injured by the wrongs or torts of the collector or his deputies. The plaintiff's suit is on a contract, and the injury complained of as a breach of that contract is in the nature of a tort committed on the plaintiff's property by one of the collector's deputies, for which the collector and his sureties are not liable on his bond required by the 3143rd section of the Revised Statute of the United States, although he might be proceeded against under the 3149th section."

In *Idaho Gold Reduction Co. v. Croghan*, (Idaho) 56 Pac. Rep., 164, it was held that a private individual cannot sue on a postmaster's bond, the court, among other things, saying:

"We know of no law authorizing the bringing of suit upon a postmaster's bond by a private party. It could only be done by virtue of some statutes of the United States, and we know of no such statute. The statutes of the United States (Rev. St. U. S., Sec. 784) provide for the bringing of action upon the bond of a marshal, by any person injured by a breach of the condition of such bond; but no such provision is made as to the bond of a postmaster. * * * That an action can be brought upon the official bond of a postmaster by a private party alleged to be injured by the wrongful conversion, by the postmaster, of moneys belonging to such private person, and that without setting forth or producing the bond, or a copy of it, in the record, is a proposition of which we can find no authority. That the postmaster is liable to a private person for money or property lost through the negligence or wrongful act of the postmaster or his assistants or servants is, we think, established by the authorities; but we have found no case where such recovery was had or sought by action upon the postmaster's bond to the United States."

In *White v. Wilkins*, 24 Me., 299, Shepley, J., said:

"No private suit can be maintained on an official bond made to the state or its treasurer without its consent. *Commonwealth v. Hatch*, 5 Mass., 191. And when the statute giving the consent prescribes the remedy, that remedy must be pursued."

Commonwealth v. Hatch, 5 Mass., 191, was instituted for the use and benefit of Asa Nichols on the bond of Bruce, who was the inspector of beef for the Commonwealth, and the bond declared on was conditioned for the faithful performance of the duties of his said office, and the bond was put in suit in the name of the Commonwealth by Nichols for his own use, without any authority from the legislature or the executive department, to recover a compensation out of the penalty for damages which he (Nichols) alleged that he had sustained by the unfaithfulness of Bruce in his said office. The court said:

"And it appearing by the statute directing the bond, and by the bond, that it was given for the sole use of the commonwealth, and no law having authorized any person to avail himself of a breach of the condition; and it further appearing that the action was not commenced, and is not prosecuted by either of the public law officers, nor by any person having authority to prosecute the same, it was ordered by the court that all further proceedings in this action should stay."

In Missouri (*City of Kansas ex rel Blumb v. O'Connell*, 99 Mo., 357) suit was brought against a contractor and the sureties on his bond, by a party injured in the performance of the contract. The bond sued on was given in compliance with the provisions of the charter of Kansas City, which required from every contractor doing public work a bond for the payment of all laborers engaged in the work. The court said:

"The same section goes on to give the laborers an action upon the contract, and prescribes the procedure. But the charter makes no such provisions in favor of other per-

sons. Nor is it claimed that there is any statute which gives to plaintiff the right to sue on this bond. * * * This bond must be construed as a whole, and when this is done, aside from the covenant to pay laborers, it is simply one of indemnity to the city. It does not profess to create any obligation in favor of third persons, save in the single case of laborers."

An early case here (*McCue v. Young*, 10 Wheat., 406), was a suit on the bond given by the manager of a lottery to the City of Washington, in pursuance of an ordinance, and conditioned "truly and impartially to execute the duty and authority vested in him by the ordinance," and the court, in an opinion by Mr. Chief Justice Marshall, said:

"No person who is not the proprietor of an obligation can have a legal right to put it in suit, unless such right be given by the legislature; and no person can be authorized to use the name of another, without his assent given in fact, or by legal intendment. * * * The proprietors of the ticket No. 1037 have shown no right to sue on this bond. * * * But if they have, without authority, put this bond in suit, the proper course is to turn them out of court, not to render a judgment, which may bar any future suit brought by the plaintiffs, whose names have been improperly used."

From all these authorities it appears clearly that the rule of Mr. Murfree's text is correct, and that in the absence of any provision in the statute expressly giving a right of action thereon to individuals, the bond must be held to be exclusively for the protection of the government or the subdivision thereof authorized to require it.

(*c*) *The general rule is supported by reason.*

The bond is required to run to the government, and is required to be given in order to secure the performance by the officer of his official duties. Now, where those duties concern the public only, our question can, of course, not arise, but where those duties not only concern the public but also affect individual interests in the absence of anything

whatever in the statute relating to individual rights, how can it be claimed that the bond required to be given *to the government* for the performance of the duties *to it* shall be held to include protection to individuals affected by the discharge of those duties as well as the government itself? We are not now speaking of the *policy* of protecting those interests. Let it be conceded that such policy should prevail. The question here is not one of policy, but is merely one of *construction*.

Mr. Murfree, in the passage hereinbefore quoted, says that "it is usually provided that bonds given by officers to states and counties shall be available to protect the interests of private persons who may be aggrieved by the breach of such bonds." But though this is the usual course (*Maryland v. Baldwin*, 112 U. S., 490), it is not uniform nor universal. Though *now* generally pursued, it was not always so. The question is: Is there any necessity for such course; is there any sense in it; does it serve any purpose; does it affect or change in anywise the meaning of the statute? Would the statute without such provisions mean exactly the same thing that it does with it? If the statute without the provisions relating to individual protection and individual rights means exactly and precisely the same as with such provisions, why and how did the modern course originate of inserting such provisions in the statutes—that course to which Mr Murfree refers?

The rule of construction for which we contend is not a mere technicality, though as a merely technical rule for the construction of written laws it would be strong enough, because there are in that regard certain defined and settled rules of law absolutely essential in determining the meaning of statutes, and since all legislative bodies are necessarily presumed to know the law, there is no impropriety in assuming that every statute is enacted in the light of said rules. And although this is universally true in regard to all such rules, it is, and ought to be, pre-eminently true of such a rule as

we are contending for here, one which merely holds that, in the absence of language to the contrary, the implication will arise from a statute requiring a bond to the state from a public officer for the discharge of his official duties, that it is intended wholly for the protection of the state, and not at all for the protection of any individual whatever. What if this rule of construction as an original proposition be wrong? It is now an established rule of construction, and every statute enacted in the light of it ought to be read, in such light. Because if the legislative body wants the law to be otherwise than it would be when thus read, all it would have to do would be to say so in one or two words, and when it says nothing it must be presumed to intend the consequences of its silence.

But we were saying that this rule of construction is not a mere technicality, based upon the principle that a bond must be presumed to be for the purpose of protecting the party to whom it runs. There are many other reasons for this rule and they find expression or explanation from the provisions of the various statutes which have from time to time been enacted in different jurisdictions for the purpose of protecting individual interests where the duties of the public officer alike affect public and private interests. As an example of those reasons, where both such interests are involved and the bond is required for the purpose of protecting both interests, how are such interests to be protected as regards *each other?* If there should be both a public and private loss, if the penalty of the bond should be insufficient to cover both, which is to have priority? Or if they are to be prorated, on what basis is it to be done? Again, as the number of individuals affected may be exceedingly great, and the first loser may not exhaust the penalty of the bond, if the individual is authorized to sue, what is to become of the residue of the penalty as to future losses, private or public? And, therefore, on account of these and other complications of a kindred nature, who is to bring the suit in case of a private loss,

who is to control and manage it, the individual or the state? Again, where there are numerous private losses or injuries which in the aggregate exceed the amount of the penalty, are they to be prorated or is the first come to be first served, after the fashion of the diligent creditor who first seeks a common fund? Is there to be any limitation of time against the individual loser? Statutes of repose do not as a usual thing run against the state, but the wisdom of the ages teaches their usefulness, if not their necessity, as against all private claims. Therefore, if the bond is to cover private injuries, some period of limitation ought to be prescribed therefor. As to all these matters the statute should provide. For all these reasons, and possibly for others of a like character which may suggest themselves to the court, a bond running to the state, given by a public officer under a statute requiring it for the discharge merely of public duties and not more, ought not to be inferred to be for private protection of individuals. The inference is just the opposite. The inference in favor of individual protection cannot be drawn, because how can the difficulties mentioned be adjusted and settled? Who shall bring the action? In case of loss who shall pay the costs? Who has priority? If there be no priority, on what terms shall the penalty be prorated? What is to become of the bond for the future when judgment is once rendered thereon? What period of limitation is to govern and apply to the bond as to private suitors? All these and other like matters cannot be left to inference, but must of necessity be regulated and controlled by express provisions of the statute.

And in practice it will be so found. (1 Rev. Sts. Mo., Secs. 478-490) Wherever a statute provides that the bond shall be for the protection of private interests it will be invariably found that some provision is made in relation to all or at least many of the matters hereinbefore referred to by us, thus showing the importance of the provisions, their necessity, where private rights exist and the effect upon pri-

vate rights, where all such provisions are wanting. We believe, after quite a thorough search through the authorities, that, aside from the opinions below, no case can be found in which it has been held that, where there is in the statute an absolute silence upon individual rights and interests, an individual can maintain an action upon the official bond of a public officer given to the government. The view of the law taken below on this subject was neither in entire accordance with our contention nor entirely contrary thereto. The opinions below, not perhaps stated expressly or directly, but certainly by necessary implication, were that it is necessary for the statute prescribing the bond, either expressly or by legal intendment, to provide for the protection of individual interests. It was not claimed that the statute here involved expressly provided any such protection, but it was held that the statute does this by legal intendment. That conclusion was based largely, if not entirely, upon the supposed difference between the offices of the circuit and district court clerks, holding that such legal intendment must exist with reference to the clerk of the circuit court because of the fact that his duties are largely confined to and concern private suitors, having little to do with the United States, and intimating so broadly as to be tantamount to a direct ruling to that effect, that it is different in the case of the district clerk, whose duties almost entirely concern the United States, and have very little, if anything, to do with individuals, and that in the latter case there can arise no such legal intendment. Now, we propose, in connection with the discussion of this question, to take up and review the statutes of the United States relating to clerks and their bonds, not only as they existed at the time the bond in suit was given, but also as they were originally enacted in 1789 at the adoption of the Judiciary Act, and were afterwards changed and amended from time to time. And we also propose to review in the same manner the other statutes of the United States bearing upon similar officers

and their bonds, and which can with perfect fairness be said to stand *in pari materia* with the statute directly involved herein. This for the purpose of assisting this court to arrive at a true and correct construction of said statute. But we cannot refrain from saying now, somewhat in advance and perhaps prematurely, that the strangest thing in this entire case is that, although the circuit court's opinion is based upon a supposed or fancied difference between the bonds of circuit and district clerks, the statute makes no such difference whatever, and that in reality the very same section of the statute, in the same words exactly, requires a bond to be given by the clerks of the supreme, circuit and district courts, and that, therefore, the bond in each case must, of necessity, be for the protection of the same interests, and impose upon the officer and his sureties the same character of liability. There cannot be in one case a legal intendment that does not exist also in the other cases. If, therefore, the the circuit court was right in holding that there is in the case of the district clerk no legal intendment in favor of individual rights or interests, so that the individuals injured by his failure to discharge his official duties may sue on his bond, then clearly it was in error in holding that there was such legal intendment in the case of the circuit clerk. The statute says the same thing about both clerks, and it means the same thing in both instances. The statute does not apply to clerks of circuit courts only and their bonds, but also to the clerks of the supreme, district and circuit courts alike, and that originally in 1789 there was in fact no separate and distinct office of circuit clerk, the district clerk performing the duties of circuit clerk in addition to the duties of his own office. In this situation of things no construction can he given to the statute that does not apply alike to both district and circuit clerks. Now, on what ground can it be claimed that as to district clerks an implication or legal intendment arises from the statute that private or individual rights shall be protected by the bond? It

must be conceded that his official duties almost entirely concern the United States, and but rarely, if ever, relate to individual suitors. Now, as to such an office, what legal intendment arises that the bond given to the United States is not only for their protection, but also the protection of private suitors? To so hold would be to destroy the rule that, in the absence of some provision in the statute to the contrary, an official bond by a public officer to the state is solely for the protection of the state, because if the implication against said rule arises on the statute here in the case of the district clerk, it would arise in all other cases, on all other statutes. And so we maintain that here there is no room for any exception, and that here the rule prevails. The bond was for the protection only of the United States. The United States alone could sue thereon.

(*d*) *The construction that Section 795 as amended gives no right of action to individuals, nor any right to an individual, to sue upon the bond, is strongly fortified by the rule that the contract of suretyship cannot be extended by implication, and by congressional construction ascertained from other legislation upon similar subjects.*

The cardinal rule of construction is to carry out the legislative intent as gathered from the words of a statute. This does not, however, authorize the reading into a statute of words not there found, because in such case the omitted subject will be *casus omissus*, in which case they cannot be supplied, for, in *Sutherland on Stat. Const.*, Sec. 430, it is said:

"Lord Brougham said: 'If we depart from the plain and obvious meaning, we do not in truth construe the act, but alter it. We supply a defect which the legislature could easily have supplied, and are making the law, not interpreting it.' 'We are bound,' said Buller J., 'to take the act of parliament as they have made it; a *casus omissus* can in no case be supplied by a court of law, for that would be to make

law.' It will make no difference if it appears that the omission on the part of the legislature was a mere oversight, and that without doubt the act would have been drawn otherwise had the attention of the legislature been directed to the oversight at the time the act was under discussion."

Hence it will not do for a court to say that Congress should have given a right of action upon a clerk's bond, or that justice requires the clerk to respond in such instance. We are not dealing with the clerk's individual liability, but are speaking alone for sureties who, as the books say are "favored suitors of the law" and are liable only on the *precise and exact terms* of their bonds. (*Reese v. U. S.*, 9 Wall., 13, 21.) They are entitled to invoke the rule so often stated: the contract of suretyship is to be *strictly construed* and not extended *by implication* beyond its terms. (*Miller v. Stewart*, 9 Wheat., 680, 703; *U. S. v. Boecker*, 21 Wall, 652, 657; *U. S. v. Hough*, 103 U. S., 71, 73.)

In *Miller v. Stewart*, *supra*, it was said:

"Nothing can be clearer, both upon principle and authority, than the doctrine that the liability of a surety is not to be extended by implication beyond the terms of his contract. To the extent, and in the manner, and under the circumstances pointed out in his obligation, he is bound and no further. It is not sufficient that he may sustain no injury by a change in the contract, or that it may even be for his benefit. He has a right to stand upon the very terms of his contract; and if he does not assent to any variation of it, and a variation is made, it is fatal. And courts of equity, as well as of law, have been in the constant habit of scanning the contracts of sureties with considerable strictness."

If, however, the failure to give a right of action was not clearly omitted from the statute and the question were one of doubt, as expressed by the court below, *where liability was spelled out by implication alone*, then it would be proper to resort to legislative construction. (*Sutherland on Statutory Construction*, Secs. 307, 311.) This legislative intention is

best ascertained by finding what, if anything, has been done by Congress in the way of giving an individual a right of action upon an official bond; whether Congress did, as the learned judges below held, when it so intended, give it by implication, or whether it gave it in plain and explicit terms? We undertake to say that whenever Congress intended to give such an individual right of action it was given in plain, express and unmistakable terms, as we will now show.

United States marshals give bond (Sec. 783) as security for the benefit of individuals (Sec. 785), and for breach thereof any person injured may sue and recover in his own name (Sec. 784); whereas for a clerk's bond there are no such provisions. The *original* marshal's bond is filed with the clerk (Sec. 783), so that individual suitors who have an interest therein may have access thereto and have at hand the actual signatures of the sureties, if execution be denied, whereas the *original* bond of the clerk is filed with the Department of Justice (1 Supp. Rev. Stat., (2nd Ed.) pp. 65, 66, Sec. 3). The only conceivable reason for the distinction is that the United States alone is interested in the clerk's bond. By Section 786, no suit can be maintained on a marshal's bond after six years; as construed, this bar alone pertains to individual actions, because the United States is not within a statute of limitation unless expressly included. (*U. S. v. Godbold*, 3 Woods, 550, s. c. 25 Fed. Cas., No. 15219, p. 1340; *U. S. v. Rand*, 4 Sawy., 272, s. c. 27 Fed. Cas., No. 16116, p. 695.) No limitation exists on a clerk's bond. This manifestly because no one but the government has a right of action thereon.

Section 1735 requires bonds from consular officers and expressly gives a right of action thereon to individuals injured. Bonds from mail carriers are required, but the courts say an individual cannot sue thereon. (*McRea v. Williams*, 58 Tex., 328.) Section 3143 requires a bond from a collector, with like conditions as in the clerk's bond,

yet it gives no right of action to individuals, and it has been expressly ruled that an individual cannot sue thereon. (*Clark v. U. S.*, 60 Ga., 156.) So the statute requires bond from a postmaster (Sec. 3834), but an individual cannot sue thereon. (*Idaho Gold etc. Co. v. Croghan*, 56 Pac. Rep., 164.)

Bonds for the faithful performance of duties are required from the assaying officer (Sec. 3561), the assistant treasurer (Sec. 3600), special agents of disbursing officers (Sec. 3614), letter carriers (Sec. 3870) and pension agents (Sec. 4779). Although these bonds, like the clerk's, are in each instance for the faithful performance of duty, yet no express right of action is given to the individual injured. Yet in every instance individual loss may be sustained by the officer not faithfully performing his duty. No case can be found authorizing an individual recovery on any such bonds.

By section 995 all money paid into court is required to be deposited in the depositary. By section 798 the clerk is required to report at each term the status of each deposit, and by section 996 no money in the depositary can be drawn except upon an order *signed by the judge*. Section 5504 makes it a crime for the clerk to fail to pay money into the depositary. These provisions suggest that the rights of the individual suitor were so carefully guarded that Congress saw no reason why a right of action on the bond should be given to individuals.

If parties to causes did their duty in seeing that these provisions were complied with, or if the court did its duty, there could be no individual loss. Congress, therefore, intended to substitute for the personal responsibility of sureties to individuals the official responsibility of the judge, upon whom all could rely. To lend force to the argument, we may suggest there could have been no possible loss if the plaintiff, for whom it is claimed the money was paid, and who now sues *because it was his money*, had, in the cause to

which he was a party, and of which the sureties were ignorant, been careful enough of his rights to see to it that these wise provisions of the law were complied with.

If, as claimed and held below, the mere entry of the clerk of the receipt of the money was a deposit *on the order of the court*, then a compliance by the court with these provisions would have saved loss. It is not, however, to be presumed that the court ignored the law; hence, as we shall hereafter see, we must assume that the money was not paid in by order of court, and hence the clerk did not receive the money by virtue of his office.

II.

There could be no liability upon the bond for the money received by Watson unless he received same by virtue of his office. The money in this instance was not received by Watson by virtue of his office.

(*a*) *The statutes of Missouri on the subject of tender have no application in the federal courts.*

No statute of a state can, of course, have any binding force or effect upon the federal courts except by virtue of some federal statute providing that it shall apply to and govern said courts. The only federal statute on this subject is the well known section 914 of the Revised Statutes, which provides that the practice, pleadings and forms and modes of proceedings in civil causes, other than equity and admiralty causes, in the circuit and district courts, shall conform, as near as may be, to those existing in like causes in the state courts. But this statute does not include state statutes concerning tender, or which relate to mere matters of cost.

The purpose and object of section 914 have been frequently explained and defined by this court. Many states had adopted codes of civil procedure. The practice and pleadings of the common law still prevailed in the fed-

eral courts. It was deemed inadvisable that this contrariety of pleadings and practice in the state and federal courts should continue to exist. Congress was denied by the constitution the power to make any changes so far as concerned actions in equity, but it was unhampered so far as concerned actions at law, and therefore, in order to prevent, so far as it lay in its power, the inconveniences arising from the differences in the forms and practice in vogue in the two judiciary systems, it enacted said section. The practice and pleadings as established by legislative enactment in the several states were adopted for the federal courts therein *as near as may be*, but not every state enactment relating to proceedings in court. The prime object was to adopt the codes of civil procedure in the various states, and even the codes were not adopted absolutely but only "as near as may be," that is, as near as could be done in view of the rules of law, and of practice outside of matters covered by such codes, peculiar to the federal courts. And so it has come to be held by the federal courts that whenever any state statute relating to judicial proceedings is in conflict with an established rule of the federal courts, the former gives way to the latter, and that always where there is a federal statute upon any matter it always controls without regard to what may be the state statute upon the same subject. And it has also been held that very many other matters of practice are not covered at all by said section.

The manner of taking cases from a lower to an appellate court of the United States is not within said section. (*Chateaugay Iron Co., Petitioner*, 128 U. S., 544; *Fishburn v. R. Co.*, 127 U. S., 60; *Hudson v. Parker*, 156 U. S., 281; *U. S. v. Indian etc. Dis.*, 85 Fed. Rep., 930). No statute of a state is recognized which in any manner hampers or restricts the judges in the personal discharge of their accustomed duties, or which trench upon the common law powers with which in that respect they are clothed. As to all such

matters state statutes are disregarded. Sec. 914 does not include them. (*Indianapolis etc. R. Co. v. Horst*, 93 U. S., 300; *Mutual etc. Fund Assn. v. Bossieux*, 1 Hughes, 386). The state practice in relation to charging juries is not adopted. (*Martindale v. Waas*, 11 Fed. Rep., 551; *Nudd v. Burrows*, 91 U. S. 426; *Indianapolis etc. R. Co. v. Horst*, 93 U. S., 291; *U. S. v. Train*, 12 Fed. Rep., 852; *Chateaugay Iron Co., Petitioner*, 128 U. S., 553; *Chapman v. Handley*, 151 U. S., 442; *Sommers v. Carbon Hill Coal Co.*, 91 Fed. Rep. 343); nor that in relation to special verdicts or findings. (*M'Elmee v. Lumber Co.*, 69 Fed. Rep., 319); nor that relating to the examination of the defendant in any case, at law or in equity. (*Beardsley v. Littell*, 14 Blatch. 102, Fed. Cas. No. 1185); nor that relating to motions for new trial. (*Indianapolis etc. R. Co. v. Horst*, *supra; Newcomb v. Wood*, 97 U. S., 581); nor that regulating what papers may go to the jury room. (*U. S. v. Train*, 12 Fed. Rep., 853); nor that requiring exemplary and actual damages to be separately found and stated. (*Times Pub. Co. v. Carlisle*, 94 Fed. Rep. 762).

The statute of the state to which reference hereunder has been made is section 2939 (R. S. Mo., 1889) and reads as follows:

"If, in any suit pending, the defendant shall, at any time, deposit with the clerk, for the use of the plaintiff, the amount of the debt or damages he admits to be due, together with all costs that have then accrued, and the plaintiff shall refuse to accept the same in discharge of his suit, and shall not afterward recover a larger sum for his debt or damages due, and costs accrued up to the time of deposit, than the sum so deposited, he shall pay all costs that may accrue from and after the time such money was so deposited, as aforesaid."

This statute is nothing more than a regulation of costs. It undoubtedly does authorize the depositing of the amount of the tender in any case with the clerk, and thus by impli-

cation makes it an official duty of the clerk to receive and care for the deposit, but this is a mere incident to the purpose and object of the section, which is to protect the defendant from costs where the tender is wrongfully refused by the plaintiff.

There is no provision of the state law for depositing money into court. Deposits are made with the clerks, who, by express provisions of law, are liable on their bonds to individuals, the statute as to their bonds (1 Rev. Stats. Mo. 1899, Section 516) providing:

"The bond shall be conditioned that he will faithfully perform the duties of his office, and pay over all moneys which may come to his hand by virtue of his office, and that he, his executors or administrators, will deliver to his successor, safe and undefaced, all books, records, papers, seals, apparatus and furniture belonging to his office."

It goes without saying that the State of Missouri cannot prescribe the duties, or regulate the offices, of the clerks of the courts of the United States; and that, therefore, so far as said section may be regarded as a mere regulation of the office of clerk, it has nothing whatever to do with the office of clerk of the federal circuit court. But it will be argued that said section as a regulation of costs applies to said federal court, and that, therefore, the clerk of the latter court has necessarily the incidental power and authority to receive the tender provided for by said section. But this argument, if made, is untenable.

Congress has legislated upon the subject of costs. The prevailing party always recovers his costs. No tender by the adverse party can affect this right. State statutes upon the subject, therefore, have no application whatever to the federal courts. (*U. S. v. Treadwell*, 15 Fed. Rep., 532; *Pentlarge v. Kirby*, 20 Fed. Rep., 898; *Trinidad etc. Co. v. Robinson*, 52 Fed. Rep., 347).

Sec. 914 can apply to no matter upon which Congress has legislated. It speaks only when the other statutes of the United States are silent. (*Wear v. Mayer*, 6 Fed. Rep., 660; *Peaslee v. Haberstro*, 15 Blatch., 472).

(*b*) *There was no order of court directing the clerk to receive the money or assuming control over it after it was so received.*

The courts below held that the law governing this case was that the money in question must have been delivered to the clerk by some direction of the court, in order to be so in his possession by virtue of his office as to render his sureties liable for misapplication. The importance of this point, therefore, from the standpoint occupied below, itself is most important, because, according to it, if there was no order of the court directing the clerk's action, there can be no recovery in this case. The importance, or rather the absolute necessity, that such an order should have been made by the court, appears in this: That, as we shall hereinafter show, there was otherwise absolutely no authority for the clerk's receiving the money. Counsel's position in relation to the order is that, if the court made an order directing the clerk to receive the money, then the court in legal effect took possession or custody of the money, which consequently was not paid to the clerk *qua clerk*, but was paid to the clerk *for the court*, the clerk simply holding it for the court. In other words, the contention of counsel, and the holding below in relation thereto, was simply this: That on the facts in the record the money was not paid to the clerk *qua clerk*, but was paid *into court*. And the question under this head, therefore, is simply this: Was the money, on the facts as found by the trial court, paid into court? We say no. What, then, in the first place, is money paid into court? Mr. Justice Story, in a case on the circuit, (*Ex-parte Prescott*, 2 Gall., 146, Fed. Cas. No. 11388) once said upon this question:

" 'Money deposited in court' cannot mean money brought in and deposited *sedente curia*, in the actual manual possession of the court. Such a construction would be against all practice, as well as all legal reasoning. It must therefore mean money, which is deposited subject to the order of the court, be it in whose actual possession it may, whether of a bank or of an officer of the court. In such a case, the bank or officer acts as the mere fiduciary, or depository, of the court, and in legal contemplation the money is in the custody of the court. It would be a contempt of the court for any other person to intermeddle therewith."

We shall not stop at this point to cite further authorities on this question, but shall, for the time being and for the purposes of this discussion, assume that the statement of that great jurist and law writer is correct, and that money is paid into court when, and when only, it is so deposited, be it in whose actual possession it may be, that it is actually subject to the order of the court, and that it makes no difference whether the money be held by the clerk of the court, by the regular depositary, by a special depositary, or by any other instrumentality, a trust company, or any individual or corporation whatsoever. All these different instrumentalities stand exactly upon the same footing, it makes no difference which one holds the money, if only it be subject to the order of the court; in such case it is deposited, that is to say is paid, into court; and if on the other hand the court has not control over the money, that is to say, if it is not subject to its order, it makes no difference where or by whom it may be held, it is not then deposited or paid into court.

Now, we call special attention to one particular point appearing in Judge Story's statement, to-wit: That, wherever the court has control over money deposited subject to its order, its control is supreme, absolute; no other power whatever has any right to meddle with it in the slightest degree, and does so at its own peril, and for attempting to do so would be subject to contempt. Wherever the ultimate title to the money may be, for the time being it belongs only

to the court, and, as the saying is, it is in the custody of the law. No one can take it from such custody. It is not even subject to legal process against the ultimate owner. No one can with impunity seize or move or disturb the court's possession. If, therefore, in any given case the court has not this supreme power over the money in dispute, one can rest assured that it has not been paid into court, it is not deposited in court, it is not in the custody of the law. Now, then, what orders were made by the court in the original case in which the tender was made in relation thereto? Prior to July 2nd, 1894, all that appears in the records of said court on the subject is, (1) a recital in the answer of Henry county in relation to the tender as follows: "And defendant says it at all times has been ready and willing to pay plaintiff said sum ($2525), and now here again tenders to plaintiff said sum in full payment of said bonds and unpaid interest due thereon * * * and now brings the said sum into court" (Rec. 13), and (2) a minute made by the clerk on March 3, 1891, on the records of the court in relation thereto, as follows: "This day comes defendant, by its attorney, and files answer, and tenders to plaintiff and deposits with the clerk the sum of $2525 in payment and satisfaction of his cause of action in the petition set forth."

We say "prior to July 2nd, 1894," for the reason that before that date Watson had died, that any defalcation by him had, therefore, already occurred, and that the court could not, as a matter of course, thereafter acquire for the first time control of said money under such circumstances. So much in passing. We shall refer to this feature of the case later on. Whatever may be the correct view to take of it, we desire now to consider by itself the record as it existed prior to July 2, 1894, for the purpose of determining whether prior to that date the court had secured control of the money deposited with Watson so that it alone had the absolute right and power to dispose of it, and that no one else had any right or power to interfere therewith.

The recital in the answer referring to the fact of tender had no such effect. That recital was nothing but the statement of the defendant, it was binding upon no one and it was inaccurate in saying that the defendant "now brings said sum into court," for the reason that the money was not brought into court but had been paid to the clerk instead of into court. Now, then, before the clerk made the minute in relation to the matter, when nothing had been done but paying the money to him, and filing an answer reciting the fact, did the court have control of the money? Was it within the disposition of the court? Could not the defendant, Henry county, have withdrawn it? For, observe, we have here to do only with the controlling power and authority of the court over the money, because up to this time and for years afterwards the plaintiff in that suit refused to accept the tender or to recognize the money as his, but insisted by his course of conduct in maintaining the position that the money was Henry county's, in which he had no interest or concern whatever. And the question we now ask is this: After the money had been paid to the clerk, after the answer had been filed, and before any minute thereof had been made, could or could not Henry county have legally withdrawn the money without the leave of the court first obtained? If said county had, with only the clerk's consent, immediately withdrawn the money would they have been guilty of contempt of court for interfering with money in the court's custody and control? The asking of these questions is their own answer. Henry county could have withdrawn said money without the court's consent. What interest did the court have in it? It was Henry county's money, paid voluntarily by it to the clerk. No one else claimed it. No one else had any interest in or right to it. The court had not been asked to take control over it, and had not done so. Having been voluntarily paid by Henry county for the use of plaintiff, and having been declined by him, the money remained the county's money, and could have been withdrawn

by it of its own motion, without the leave or license of any-one.

But if this was true before the minute was made by the clerk, showing that the tender had been made and the amount thereof *deposited with the clerk*, that is to say, reciting the facts just as they occurred, that the money had been deposited with the clerk in payment and satisfaction of plaintiff's cause of action, *not that it was brought into court*, as inaccurately stated in the answer, how could such a minute affect the matter one way or the other? If the facts them-selves before being written upon the record of the court did not place the money subject to its control so that it could not be withdrawn without its order consenting thereto, how could the writing of the facts upon the record have such effect? The recording of the facts could not change or alter, increase or diminish, their force or effect. They were the same before being recorded that they were afterwards. They meant the same thing. They had the same effect. (*Campbell v. Booth*, 8 Md., 107, 117).

And this, whether the judge signed the minute or not. It will be observed that the trial court below in its opinion states that it appeared affirmatively at the hearing of this case that the minute of March 3, 1891, was signed by the judge, and lays considerable stress upon that fact. The record does not bear out this statement. A critical exam-ination of the special finding of facts made by the court, and upon which its conclusion of law was based, fails to disclose such fact. So far as the record is concerned, it does not affirmatively appear that the judge signed or ever saw said minute. And we apprehend that there is no presumption that such a minute as that minute was seen or signed by him. But we don't care whether the judge signed the minute or not. The minute orders nothing. It directs nothing. It is a mere narrative correctly reciting what had been done between defendant and the clerk. The court

does nothing. The court intimates nothing. The court assumes nothing. If, by signing the minute—assuming for the moment that the judge did so sign it, which we deny—the judge thereby bound the court as to its correctness, it amounts to nothing because it remains still a narrative, reciting that the defendant had paid the money *to the clerk.* And that fact, however it may be told, or by whomever it may be recited, or in whatever form it may be preserved, on paper or stone or iron, means always one and the same thing, and has always one and the same effect. The payment was to the clerk, not to the court, and it makes no difference who tells the story of the payment, whether it be the clerk or the judge or both of them.

Now, as to the proceedings in court on July 2, 1894, and subsequently thereto. Watson died on March 24th, 1892, and any dereliction of duty by him must have been committed prior to that date, and if any liability, in favor of plaintiff herein, and on said bond, exists, it must have accrued prior to that time. If Watson had violated no duty of his office, if he had committed no breach of his bond, in his lifetime, it is impossible to understand how, after his death, such violation of duty or breach of bond could be established against him or his sureties. Was the money in his possession during his lifetime by virtue of his office? If not, that ends the matter, because it never came into his possession by virtue of his office after his death. And no proceeding by the court subsequent to his death, no recording of orders thereafter, could possibly produce a contrary result. Having died innocent of a breach of the bond, no breach could be made by any subsequent order or decree of the court.

The trial court attached great importance to the subsequent proceedings in the original case. In its opinion it said, among other things: "The subsequent record entries in the case show that the court at all times regarded the

money as under its control." We have already remarked that the question in relation to the control had by the court over the money was necessarily confined to the period of Watson's existence, because, unless the court had such control at some moment in Watson's lifetime, the fact of such control could not constitute an element or factor in determining Watson's liability on his bond. If the court never had control of said money in the lifetime of Watson, then, so far as concerns said bond and liability thereon, the court never had such control, and it makes no manner of difference what the court may have thought, or what afterwards the court may have done to secure such control, or even that it actually secured it, or what it may have recited or spread upon its records relative to what it had previously thought or intended or understood. It is true the question is, was it the court's money, *i. e.*, in its possession? But was it its money while Watson yet lived, is the real question. If it became the court's money only after Watson's death, it was, of course, physically impossible for him to take it as the money of the court.

We may examine this subject in yet another light. Wherever money is lawfully paid into court by the defendant for the use of the plaintiff in support of a plea of tender, that is to say, wherever said practice prevails and the money in accordance therewith is actually paid into court, the effect of such payment is to appropriate the amount thereof to the satisfaction *pro tanto* of plaintiff's claim, and to the extent thereof the claim is regarded as paid. Therefore (if indeed, which we deny, Henry county had the right to pay the money into the federal court in lieu of a tender), the inquiry made by us of the trial court, asking if on the facts found by it the plaintiff's claim had been paid, or could plaintiff now compel the payment of the judgment in his favor by Henry county, was not an idle inquiry, but was material and exactly in point.

Because, if Henry county still owes the amount of the judgment, then it has never been paid, and if it has never been paid, it is simply for the reason that the amount thereof was not paid into court. Paying into court was (assuming, for sake of argument, that which we elsewhere deny, that payment could be made into court for such purpose) payment to plaintiff. Therefore, if there was no payment to plaintiff there was no payment into court. The trial court, therefore, erred in declining to answer our inquiry, and it may be that this error led to the court's erroneous conclusion, that the money was in the custody of the court. It may be that had the court carefully considered our inquiry, it would have appreciated and seen and understood how plain and clear was our contention there and here, that the money had never been for a single moment of time in the possession of the court, that the clerk had always held the money in his own personality and individuality, and never for a single instant as the trustee, agent or intermediary of the court.

For surely there can be no pretense that on the facts found in the record Henry county ever paid plaintiff's claim. Will anyone seriously contend that it cannot now be made to pay the judgment rendered against it? Certainly it was the opinion of the court rendering said judgment that its collection could be enforced, for otherwise why render it? The court found that plaintiff was entitled to a judgment for a specified sum on each count of the petition, and then rendered judgment for the aggregate amount of the three sums. If it had been already paid in full by Henry county, why was a judgment rendered therefor?

The rule is, that wherever money is properly paid into court in aid, or in place, of a tender, it immediately becomes the property of the plaintiff, whatever may be the result of the action; if he accepts it in satisfaction of his claim, the matter ends there, but if not it still belongs to him. to be

applied in part payment of his judgment should it exceed the amount of the tender, or in payment of his judgment should it not exceed said amount; and hence it is that the money thus paid is regarded as stricken out of the complaint; belonging to plaintiff, he is no longer suing for it and there is no issue in regard to it. The question is as to the excess over and above that amount claimed by plaintiff. He has been paid to the extent of the money paid into court. The case proceeds to trial, therefore, only upon the question of excess. And the verdict is for or against plaintiff, according as the jury find for or against an excess. In the case of this plaintiff against Henry county the court found against any excess, holding that the amount paid by Henry county to the clerk, Watson, equaled the amount owed by it to plaintiff, but notwithstanding this the court rendered judgment in favor of plaintiff against Henry county for the full amount owed by it to him. Now, this was wrong if the money had been *lawfully* paid *into court* by the county for plaintiff. The debt having already been paid in full, judgment should have been rendered in favor of the county. And this goes a long ways towards showing, if it does not do so conclusively, that the court rendering the judgment (Judge Philips) understood that the money had not been lawfully paid into court. He was perfectly familiar with the rule mentioned here. While upon the bench of the Kansas City Court of Appeals he had written an opinion holding in favor thereof. (*Voss v. McGuire*, 26 Mo. App., 452). The rule is universal. It is not confined to Missouri; it prevails in the other states, as shown by the authorities cited by Judge Philips in that case. It also prevailed in England, and was in fact borrowed from that country by our courts. (*Levan v. Sternfeld*, 25 Atl. Rep., 854; *Turner's Sons v. Lee Gin etc. Co.*, 41 S. W.R ep., 57).

Let us, then, turn to the authorities supporting and illustrating the views expressed under this head.

In Illinois it is held that a clerk is not by virtue of his office a receiver of the court, and is not bound to receive money paid into court as a tender, except upon an order of court; and that money deposited with the clerk without an order may be withdrawn at any time before the court has recognized it as a fund in its control, or the other party has manifested a willingness so receive it. (*Hammer v. Kaufman*, 39 Ill., 87).

In New York (*Baker v. Hunt*, 1 Wend., 103) the defendant paid money to the clerk to satisfy plaintiff's demand; the clerk having returned the money to defendant, plaintiff moved for an order on the clerk to pay it to him. The court denied the motion, saying:

"The clerk had no right to receive the money without a rule of court, and acted correctly in returning the money to the defendant."

In Mississippi defendant paid the full amount of a judgment to the clerk of the court, but there being no statute authorizing the clerk to receive it, the court held it was no legal payment or satisfaction. (*Lewis v. Johnson*, Walker, (Miss.) 261).

In Indiana, prior to 1881, the court uniformly held that in the absence of a law making it the duty of the clerk to receive money handed to the clerk, along with an answer pleading tender, for the purpose of keeping the tender good, no such duty existed, and therefore a clerk and his sureties could not be liable therefor on his bond. (*Casey v. State*, 34 Ind., 105; *Dorpfner v. State*, 36 Ind., 111; *State v. Woodman*, 36 Ind., 511; *State v. Givan*, 45 Ind., 267; *Bowers v. Fleming*, 67 Ind., 541).

In *Casey v. State*, 34 Ind., 105, it was said:

"The only question presented for our consideration is this: Are the sureties liable for money paid into open court and handed to the clerk with an answer of tender for the

purpose of keeping the tender good? There is no law in this state rendering the sureties liable in such a case, there being no law making it the duty of the clerk to receive such money."

In West Virginia the statute on the subject of condemnation of lands provided that "the defendant may pay into court to the clerk" the amount of the compensation fixed by the commissioners. The condition of the clerk's bond was to "account for and pay over, as required by law, all money which may come to his hands by virtue of said office." In a proceeding of that nature in that state the compensation as fixed by the commissioners was paid to the clerk upon the filing of the report, exceptions were filed, and upon hearing the compensation was increased, and the clerk was ordered to pay over the sum deposited with him but failed to pay it. In an action by the landowner upon the clerk's bond against him and his sureties (*State ex rel. Blake v. Enslow*, 41 W. Va., 744; s. c. 24 S. E. Rep., 679) the court said:

"There is no evidence that the money ever was in court or subject to its disposal. *It is true the court made two orders on the supposition that the money was under its control.* The clerk wrote these orders and it is altogether probable that he had already disposed of the money * * * Everyone is presumed to know the law. Hence it must be presumed that the company, in depositing the money in the clerk's hands, and Mrs. Blake, in allowing it to remain for so long a time without objection, when she might have had it herself, were fully informed as to the law, and that their conduct was controlled by their personal trust and confidence in the personal integrity of the clerk, and not from reliance on his official bondsmen. *There was no order of the court showing that it had received the money and placed it under the control of the clerk*, and, therefore, his official bondsmen, if aware of his having the fund, had the right to presume he was holding it on his individual responsibility, with the consent of the depositor, the railroad company, and with the consent of Mrs. Blake, for whom the deposit was made. * * * Nor does the failure of the court to make

any order on the subject change the responsibility. Courts seldom act in such matters on their own motion, and when the parties in interest do not complain, they presume them to be satisfied."

Applying the clear and strong reasoning of the above case to the one here before the court, we may say: There is here no order placing this money in the custody of the clerk *as money paid into court*. No such order was possible, for under the law, as we shall hereinafter see, the only possible order or act the court could have made would be an order placing the money in the registry. If this order had been made and the money thereby had become *money paid into court*, and the court had then delivered it to the clerk to be placed in the depositary, and the clerk, instead of placing it in the depositary, had converted it, a question might then arise as to the bondsmen's liability, entirely different from the present question. But this was never done; the money never became *money paid into court*. It was defendants' money paid to the clerk to keep the tender good. For such money the bondsmen are not responsible. It was money paid to the clerk as an individual, and trusting to his personal integrity. The parties knew the law and assented to the payment. For years it was never accounted for by the clerk as a fund in court, and was never treated or considered such. The parties had a right to make this arrangement if they saw fit, and it was not the duty of the court to object. A defendant, anticipating judgment against him, may place money in a clerk's hands to satisfy such judgment when rendered, as he may in the hands of any third person, but such money will not be held by the clerk *virtute officii*. If it be said that if the money was not *paid into court*, it was *paid to the clerk*, and *received by him in a cause pending in the court*, and was, therefore, subject to Section 995, and the clerk was bound to place it in the depositary, the answer is that, in the legal sense, it was not "*received* by the *clerk*," but by the individual. The clerk had no possible right or

duty to receive it. Tender money paid to the clerk and not into court is not paid to the clerk as clerk, and is never held by him as clerk.

In New Jersey, by the statute, condemnation money, if not accepted, is to be paid into court. In a proceeding of that nature (*National Docks etc. Ry. Co. v. R. Co.*, 28 Atl. Rep., 673) the money had been paid to the clerk, and, he defaulting, suit was brought upon his bond against him and his sureties. The court said:

"The clerk is not the court. He is merely the scribe and custodian of its records. He is not the agent of the court, nor has he any authority to act for or represent the court in its absence. In the discharge of its judicial duties, a court can have no agent or representative. The clerk of the circuit court does not possess the legal shred of judicial power. He has no power to decide what is money, nor in what circulating medium payment, in such a case, must be made, whether in coin or currency. For anything that appears to the contrary, this payment was made to the clerk, not in the presence of the court, but in its absence, and without its knowledge, and without any order or rule being entered on its minutes, or other record being made. * * * It has long been settled that when a defendant in a suit at law desires to pay the sum, which he admits to be due, into court, in discharge of his liability, to the plaintiff, he can only do so under an order or rule of the court in which the suit is pending, and that a payment to a clerk in such a case in the absence of an order or rule, is not a payment into court. The usual statement is that the clerk has no authority to receive money for the court without a rule. The Supreme Court of this state has recently enforced this doctrine. (*Levan v. Sternfeld*, 55 N. J. Law 41; 25 Atl., 854). * * * In the absence of statutory direction or a special order, or a general regulation, the clerk, in my judgment, has no more authority to receive money in such a case for the court than he has to decide what sum shall be paid, or what shall be received as money, or where the money shall be placed for safe keeping, or to whom it shall be paid. As a general rule, money cannot be paid into the English Court of Chancery without a rule."

In a very recent Tennessee case (*Turner's Sons v. Lee Gin etc. Co.* 41 S. W. Rep., 57) the origin of the practice of paying money into court in aid, or in place, of a tender, and the procedure therein, are discussed at great length. The court said:

"'The rule of bringing money into court was introduced in the time of Charles II to avoid the hazard and difficulty of pleading a 'tender.' In proper cases, when the dispute is not whether anything, but how much, is due to the plaintiff, the defendant may have leave to bring into court any sum of money he thinks fit, and the court makes a rule, that unless the plaintiff accepts it, with costs, in discharge of the action, it shall be struck out of the declaration, and paid out of the court, to the plaintiff or his attorney; and the plaintiff, upon the trial, shall not be permitted to give evidence for the sum brought in.' (*Tidd Prac.*, *619). The motion for leave to bring money into court is a motion of course, and should be regularly made before plea pleaded. (*Id.* *621). Bringing money into court is, in general, considered as an acknowledgment of the right of action to the amount of the sum brought in. The plaintiff, therefore, on producing an office copy of the rule, is entitled to receive it at all events, whether he proceed in the action or not, and even though he be non-suited, or have a verdict against him. (*Id.* *624). In speaking of non-suiting, Tidd says: 'When money is brought into court, unless the plaintiff will accept it, with costs, in discharge of the suit, it is considered as paid before action brought, and struck out of the declaration; and the action proceeds as to the residue of the demand in like manner as if it had been originally commenced for that only.' (*Id.*). The practice of bringing money into court under the general rule is as follows, to-wit: 'When money is brought into court, the plaintiff either accepts with costs, in discharge of the suit, or proceeds in the action. In the former case, he should take an office copy of the rule and procure an appointment thereon from the master or deputy to tax the costs and serve the same on the defendant's attorney; or in default thereof, it will be considered that the plaintiff intends to proceed in the action to recover a larger sum than that paid into court. * * *

If the plaintiff proceed in the action, the sum brought into court is, by the terms of the rule, to be struck out of the declaration and to be paid out of court, to the plaintiff or his attorney; and upon the trial of the issue the plaintiff shall not be permitted to give evidence of the same. In such case, if the plaintiff proceeds to trial otherwise than for non-payment of the costs, and does not prove more to be due to him than the sum brought in, the plaintiff, on the rule being produced, shall be non-suited, or have a verdict agaist him, and pay costs to the defendant. * * * But if more appear to be due him, he shall have a verdict for the overplus and costs. * * * But the plaintiff is entitled to costs up to the time of bringing the money into court.' (*Id.* 626; *Keith v. Smith*, 1 Swan, 92). This case was tried in the circuit court in 1849, and decided by our Supreme Court in 1851. It was an action of assumpsit for work, labor etc. The pleas were non-assumpsit and notice of set-off. There was no plea of tender at all. The parties had been in crosslitigation, and in the last suit defendant offered as set-off a judgment previously rendered in his favor, and to avoid the effect of this setoff plaintiff had tendered the amount of this former judgment, which was refused. It will be noticed that this case was decided before the act authorizing payment of tender to the clerk, taken from the Alabama Code of 1852, and while money could only be paid into court by the debtor, under some rule made. The syllabus is as follows: 'Tender in Court, How Made. To be available, a tender made in court must be under a rule of court, and accompanied by a payment of proper costs up to that time.' In such cases, of course, the payment into court must be made upon the terms imposed by the rule. If the general rule is adopted, then the form and practice laid down by Tidd must be observed. If a special rule is made, then the payment must be in accordance with the terms imposed by the special rule. The court said: 'It seems that the plaintiff tendered the amount of this judgment to avoid it as a set-off, and the tender was refused; he then paid the money to the clerk of the court for the use of the defendant, but it was not received by the defendant. The facts in this part of the case are so indistinctly stated that we cannot assume anything definite upon them. The object of the plaintiff doubtless was to avoid the effect of the set-off in reference to the matter of costs, now amounting to the

sum of $540.' 'But it does not appear that the money offered as a payment of the judgment was paid into court under an order or rule of the court authorizing it to be done. If a party bring money into court he must do so under a rule of the court, and upon payment of proper costs up to that time. The debt so paid will thereupon cease to form any part of the future litigation in that behalf, and the other party will be entitled to receive the money. (1 *Tidd Prac.*, 620).' 'The proper practice in this respect seems not to have been adopted in the present case.' Evidently the court was here considering the practice of the payment of money into court under the general rule as laid down by Tidd, and where the legal scope and effect of such payment was prescribed by the terms of the rule itself. (See *Caruth Lawsuit*, p. 226, note 2; *Thomp. & S. Code*, Sec. 2926, note). Such rule can have no application to the tender of money, and the payment thereof to the clerk, under a statute which imposes no terms whatever, but leaves the effect of tender and acceptance to the general principles applicable to such cases. Unquestionably, under the practice as thus laid down by Tidd, and followed in the case of *Keith v. Smith*, 1 Swan, 92, the rule of the court under which money was paid into court prescribed the terms upon which it was placed in court, and the terms upon which it might be withdrawn, and these terms would be such as the court should see proper to make. We have already shown what the general rule was when the court did not prescribe any special provisions or conditions. And in many cases the practice was as contended for by plaintiff, to-wit: that he might withdraw the amount paid in, and continue his litigation for the balance claimed. In such case the amount thus withdrawn is stricken from the claim, and, in the event the plaintiff is successful to the full amount claimed, he only gets judgment for the balance. But since the code of 1858 the tender of money and payment into court is made under that statute, and not under a general rule of court. This, of course, refers to payments generally, and not to payments made under special rules prescribing conditions and terms."

In Colorado the statutes provide that the clerk shall give a bond conditioned that he will faithfully perform his duties as clerk, and punctually pay over to the persons legally

authorized to receive the same, all moneys that may come into his hands by virtue of his office. An assignee, having in his possession money of the assigned estate which could not then be distributed, amounting to $3,500.00, turned the same over to the clerk. Afterwards, the clerk having failed to account for a large portion of the money, the assignee instituted two actions on the clerk's bond against him and his sureties. A demurrer was sustained to both complaints, and the Supreme Court sustained this action in an opinion which contained much matter that is interesting reading here (*People to use v. Cobb*, 51 Pac. Rep., 523). On the question as to whether the clerk had received the money by virtue of his office, the court there said:

"We are therefore to consider whether the acts charged against Adams amounted to a violation of his official duties. Of course, it was his duty, as it is the duty of every person, to account for money intrusted to him, and for any failure in such respect he would be personally liable; but that he would be honest in his dealings, and faithfully discharge his duties as a man and a citizen, was no part of the undertaking of his sureties. They undertook only for his faithful discharge of his official duties, and the payment by him of moneys which he might receive as clerk. He could receive money as clerk only in the discharge of some duty imposed upon him by law. Now, no authority to receive the money deposited with him by Howard can be found in the statutes prescribing and defining the duties of clerks of the district court. Independently of statute, he would be bound to take charge of moneys brought into court in pursuance of a judicial order, but the complaint distinctly states that the money was deposited without such order. Payment to a clerk of money which he is not by law, or some order of the court, authorized to receive, is not a payment into court. (*State v. Enslow*, 41 W. Va., 744; 24 S. E., 679; *Brown v. People*, 3 Colo., 115). And speaking generally, delivery of money to an officer to whom it is not legally payable is not a payment, and the sureties on his bond are not liable for his conversion or misappropriation of the fund. (See, also, *San Luis Obispo Co. v. Farnum*, 108 Cal., 562; 41 Pac., 445; *People v. Hilton*, 36 Fed., 172)."

The clerk had represented at the time the deposit was made that he had authority to receive the money. As to the effect of that representation, the court said:

"In one of the complaints is an averment (not found in the other) that, when the deposit was made, Adams represented to Howard that he (Adams) was, as clerk, authorized to receive the money without any order of the court. But this in no way strengthens the plaintiff's case. It was the conclusion, or pretended conclusion, of Adams as to the extent of his legal authority in the premises. His sureties are liable for his abuse of an authority which he possessed, but they are not liable for the consequences of his pretention to an authority which he did not possess. Howard is presumed to have known the law, and therefore to have been uninfluenced by the representation."

The clerk had entered the fact of the deposits upon the records of the court. As to the effect of that action on the part of the clerk, the court said:

"It is also argued that the entry of the deposit on the records of the court in some way operated to make it a fund in court. An unauthorized entry by the clerk is no part of the records of the court. An order by virtue of which money is paid into the court must come from the court itself, and an entry by the clerk of money as being in court, no matter in what form or in what book, without such order, is nugatory. From the facts which the plaintiff lays before us, it is clear that Adams received the deposit in his individual capacity, and not by virtue of his office."

The court had, in thirty-five days after the deposit was made with the clerk, made an order of record directing him to pay out of it the sum of $531.00, which he did, and several years afterwards had made an order directing his successor to pay over the balance for distribution among the creditors, which she did not, because she had never received any part of the money from the said clerk. As to the force and effect of said orders by the court, the Supreme Court said:

"But it is insisted that the subsequent orders in relation to the money had the effect to make it a fund in court. The complaint alleges that on the 15th day of September, 1892, the court ordered that the clerk should pay from this money a certain, specified amount, which he accordingly did. The theory of the complaint, as also of the argument, is that the court, by this order, approved or adopted or ratified the act of the clerk in taking the money. A principal may ratify an act done by his agent in excess of the authority given, or one may adopt the act of another who assumed to be an agent, but was not, in such manner as to estop himself to deny that the other was his agent. But the relations existing between a court and its clerk are not those of principal and agent, and the law of estopel does not apply to courts. Orders, judgments and decrees are made and rendered by the court in the exercise of its judicial functions, and these cannot be delegated. The clerk cannot, either expressly or by implication, be invested with the authority of the court. Doubtless, the court, upon being advised that there is money which has been placed in the hands of its clerk without its sanction may, in a proper case, order the clerk to pay it into court. When paid in, it would become a fund in court, by virtue, not of the original deposit, but of the order. *Judicial orders are not to be deduced by implication.* They speak for themselves, their meaning is to be found in their terms, *and it is not allowable by speculation or far-fetched inference, to give them an effect outside of their language.* The order we are considering was to pay a certain sum from money in the clerk's hands. At the time the order was made the money was not a fund in court; it had never been made so; and, the order was not that the payment be made out of a fund in court. The order affected the clerk in the capacity in which he held the money; it could not affect him otherwise; and, as he did not hold the money officially, it amounted only to a direction to him personally. By no system of reasoning could it operate to convert the money in the clerk's hands into a fund in court, *or to relate back, and make the original deposit a deposit in court.*"

And on the same subject, *i. e.*, the force and effect of said orders, and more particularly as to the intention of the

court as shown thereby in relation to the action of the clerk in receiving the deposit, the Supreme Court further said:

"We have discussed the orders on the basis of the statement in the complaints concerning it; but, if we were to accept counsel's theory of the effect of such an order, we would be without the data necessary to an intelligent idea of what this one really was. Why it was made; at whose instance; on what showing, and in what proceeding; to whom the money was to be paid, and for what purpose, the complaints do not disclose. If it were permissible (which it is not) to seek for the intention of the court in respect to the deposit, as such intention might be implied from the circumstances, and give it the effect of an order different from the one actually made, before we could commence our search we would have to be in possession of the unstated facts. *Furthermore, at the time of the entry* of the order *Adams may have already squandered all of the money except the amount he paid.* If he had, he did so before the money was in his hands as clerk, and before any responsibility on account of it had attached to his sureties. *No order of court* could make them answerable for a defalcation for which *they were not responsible at the time of its occurrence.* They cannot be held beyond the letter of their obligation. It was incumbent upon the plaintiff to set forth every fact necessary to fasten a liability upon them, and an important fact not stated, was the ability of the clerk at the time to turn the money into court. What we have said concerning the first order applies to the second, but it may be remarked, in addition, that it appears very plainly from the complaint that the money had been embezzled by Adams long before the latter order was made."

(*c*) *The court had no power to direct payment to Watson except for the purpose of being forthwith deposited in a proper depositary of the United States.*

We have elsewhere seen herein that the federal clerks as such have no authority to receive money offered by a defendant in aid, or in place, of a tender. We have already seen (*supra*, subd. *a.*) and will again see (*infra*, subd. *d.*) that the federal courts themselves have no power

to order or authorize the payment into court of money for that purpose. But assuming that said courts have such power, then whenever they exercise it and direct the payment into court of said money they must necessarily designate the person to whom payment shall be made. Now, Section 995. R. S. U. S., provides:

"All moneys paid into any court of the United States, or received by the officers thereof, in any cause pending or adjudicated in such court, shall be forthwith deposited with the treasurer, an assistant treasurer or a designated depositary of the United States, in the name and to the credit of such court; *Provided*, that nothing herein shall be construed to prevent the delivery of any such money upon security, according to agreement of parties, under direction of the court."

And Section 996 provides:

"No money deposited as aforesaid shall be withdrawn except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk; and every such order shall state the cause in or on account of which it is drawn."

Under these statutes officers of the United States cannot retain possession of money paid to them by virtue of their respective offices, but they must forthwith deposit the same in the proper depositary. Where money is received by them under their general authority they must deposit the same in the depositary designated by general rules and regulations upon the subject, but where money is paid to them, not by virtue of their offices, but for the court, and by direction of a special order and for a special purpose, like money paid into court by defendant in aid, or in place, of a tender, then the order must itself designate the depositary and the disposition to be made of the money. To illustrate, if the court should in such a case order payment of the money to be made to the clerk, he would not receive it as clerk,

because it is not his duty as clerk to do so, and the order was not made to pay it to him because he was clerk; payment to any other person might just as well have been ordered, and, therefore, no general rule or regulation relative to the depositaries for money paid to the clerk would answer. The order itself would have to make special provision in relation thereto.

(*d*) *Because federal courts in actions at law have no authority to order payment into court of money in aid or in place of a tender.*

We have hereinbefore seen (Div. II, sub-d. *a*) that the Missouri statutes on the subject have no application to the federal courts. There is no federal statute directly bearing upon the subject. The English practice was not a part of the ancient common law of England, and, therefore, does not prevail in this country. The English practice was not introduced until the reign of Charles II. (*Levan v. Sternfeld*, 25 Atl. Rep., 854). There is, therefore, no authority for the practice in the federal courts of this country. If authority existed, the money should be deposited into court, not merely delivered to the clerk.

(*e*) *Even if the court took action equivalent to an order directing payment of money to Watson, he did not receive same as clerk.*

This necessarily follows from what we have already hereinbefore said. It was not the duty of the clerk as clerk to receive the money. There was no binding statute on the subject. There was no general rule of court or practice upon the subject. The money could not be paid to the clerk as clerk. Therefore, if an order was made by the court directing payment of the money to the clerk, and in pursuance thereof he received it, he received it, not in the discharge of his duties as clerk, but in obedience to the order which might just as well as not have named any other person whomsoever instead of him. In receiving the money he was,

in the case supposed, acting not as clerk, but as receiver of the court. And, therefore, his bond as clerk would not be liable for any defalcation thereof.

(*f*) *There was, therefore, no breach of his bond by Watson.*

He neither received nor held the money by virtue of his office. The money was doubtless paid to him under the mistaken apprehension that the Missouri statute applied to and governed his office, but this was a mistake. That statute had nothing to do with his office, or with the court of which he was clerk. He received the money absolutely without authority for so doing. There was no federal statute authorizing it. There was no general rule of court authorizing it. There was no special rule or order made in that particular case authorizing it. The court never afterwards made an order taking charge of and control over the money. The court had no power to order payment to be made to the clerk except for the purpose of being forthwith transmitted by him to the proper depositary. In this case no depositary was designated for receiving this money. The money was paid to the clerk to be kept by him. This the clerk had no authority as clerk to do, and the court itself could not legally have authorized it. It was in direct conflict with the positive mandate of the statute. (R. S. U. S., Sec. 995). In short, the money was paid to Watson, in law, whatever else the parties may have understood and intended in fact, not as clerk, but as Watson. The wrong done by him, therefore, in not accounting for it, was not the clerk's wrong, but Watson's. And to Watson the aggrieved party or parties must look, and not to his bond.

Respectfully submitted.

SANFORD B. LADD,
FRANK HAGERMAN,
Attorneys for Plaintiffs in Error.

No. 121.
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IN THE

Filed Feb. 6, 1902.

Supreme Court of the United States.

OCTOBER TERM, 1901.

FREDERICK HOWARD, JAMES L. LOMBARD and JOHN C. GAGE, *Plaintiffs in Error,*
vs.
THE UNITED STATES to the use of DAVID D. STEWART, *Defendant in Error.*

No. 121.

In Error to the Circuit Court of Appeals for the Eighth Circuit

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ADDITIONAL BRIEF FOR PLAINTIFFS IN ERROR.

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In Error to the Circuit Court of Appeals for the Eighth Circuit.

We avail ourselves, on behalf of plaintiffs in error, of the permission granted in the order of the court re-submitting this case, to file this additional brief. It is not our purpose, however, to re-argue the case, but only to refer, somewhat more precisely and consecutively, to the several Acts of Congress involved in the discussion, correcting some slight errors in citations; to summarize briefly the conclusions of law for which we contend, and the grounds on which those conclusions are based; and in a few instances to answer some objections offered to the weight and applicability to this case of decisions cited in our former brief.

STATEMENT.

The suit was brought by David D. Stewart in the name of the United States to his use as plaintiff against the defendants. The breach alleged in the complaint was the failure of said Watson, as clerk, to pay over and account for $2,525 paid to him as such clerk for the use and benefit of plaintiff in a certain suit in said Court wherein defendant in error was plaintiff and Henry County was defendant.

The bond was executed March 3, 1887, was in the ordinary form prescribed by the law, the penalty being twenty thousand dollars, and the condition that Watson should "faithfully perform all the duties of said office and seasonably record the decrees, judgments and determinations of said Court." The facts out of which the breach alleged arose are fully set forth in the record and are referred to at length in our original brief, and in substance, are as follows:

On the 6th day of September, 1887, the use plaintiff, David D. Stewart, was the holder of three bonds of Henry County, Missouri, two for $1,000 each, and one for $500, the interest on said bonds having been paid up to September 1st, 1887. At the option of the county, these bonds were payable at any time after July 1, 1887. The bonds were payable at the National Bank of Commerce, New York. On September 6th, 1887, Henry County deposited in the National Bank of Commerce $2,525 in payment of said bonds with interest then accrued. Stewart refused to accept the money and it remained in the bank until February 6th, 1891, when Stewart brought suit in the United States Court

against Henry County for the principal of the bonds and interest from September 1st, 1887. On March 3rd, 1891, Henry County filed answer in the case. The minute of this filing is as follows: "This day comes defendant by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of $2,525.00 in payment and satisfaction of his cause of action in the petition set forth." The answer so filed set up the tender at the Bank of Commerce, renewed this tender "*as full payment*" of said bond and unpaid interest due thereon on September 6th, 1887, and concludes with the words: "and now brings the said sum into court." On February 11th, 1895, the case having been submitted to the Court without a jury, a finding of the issue made by the plea of tender was made in favor of Henry County, and the following judgment was rendered:

"It is therefore ordered and adjudged by the Court that the plaintiff have judgment for the recovery of the sum of twenty-five hundred and twenty-five dollars ($2,525.00) the aggregate amount found to be owing under the three counts of the petition, and that plaintiff pay the costs of this action and that execution issue therefor."

Watson died in 1892 and neither he nor his representatives ever accouuted for any part of the $2,525, so placed in his hands, and it is admitted that he embezzled it.

The facts are much more fully and minutely set forth in the record, ard, in our original brief, but the above are sufficient for the purposes of this additional brief.

ADDITIONAL BRIEF.

The Act of Congress under which this bond was given, was approved February 22nd, 1875, and is to be found in 18 Stats. L. 333, and in Supp. Rev. Stats., Vol. 1, 2nd Ed. p. 65, and is as follows:

"Sec. 2. That whenever the business of the courts in any judicial district shall make it necessary, in the opinion of the Attorney General, for the clerk or marshal to furnish greater security than the official bond now required by law, a bond in a sum not to exceed forty thousand dollars shall be given when required by the Attorney General, who shall fix the amount thereof."

"Sec. 3. That the clerks of the Supreme Court and the circuit and district courts, respectively, shall each, before he enters upon the execution of his office, give bond, with sufficient sureties, to be approved by the court for which he is appointed, to the United States, in the sum of not less than five, and not more than twenty thousand dollars, to be determined and regulated by the Attorney General of the United States, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments, and determinations of the court of which he is clerk;

And it shall be the duty of the district attorneys of the United States, upon requirement, by the Attorney General, to give thirty days notice of motion in their several courts that new bonds, in accordance with the terms of this act, are required to be executed; and upon failure of any clerk to execute such new bonds, his office shall be deemed vacant.

The Attorney General may, at any time, upon like notice through the district attorney, require a bond of increased amount, in his discretion, from any of said clerks within the limit of the amount above specified; and the failure of the clerk to execute the same shall in like manner vacate his office.

All bonds given by the clerks shall, after approval, be recorded in their respective offices, and copies thereof from the records, certified by the clerks respectively, under the seal of court, shall be competent evidence in any court. The original bonds shall be filed in the Department of Justice."

The original legislation of Congress requiring and prescribing the terms of these bonds is found in the Judiciary Act of 1789, 1 U. S. Stat. L. 76, and is as follows:

"Sec. 7. * * * And the said clerks shall also severally give bond with sufficient sureties (to be approved by the Supreme Court and district courts respectively) to the United States in the sum of two thousand dollars, faithfully to discharge the duties of his office, and seasonably to record the decrees, judgments and determinations of the court of which he is clerk."

This act remained in force until March 3, 1863, when a further act was passed, 12 Stats. at large, p. 768, permitting the judges of the several courts to fix the amount of the penalty of the bond, but not otherwise changing its terms and conditions. No further change was made until February 22nd, 1875, when the act was passed, 18 U. S. Stats. L. 333, which is now embodied in the Revised Statutes, as above stated.

Two questions arise in this case:

First. Is it the intention of this legislation that the bonds so required shall be bonds for the protection of the United States solely, or is it intended that they shall be for the protection of individuals as well, or has any person other than the United States, a right to maintain an action upon any such bond? The above is a statement of the same question in two forms.

Second. If the bond is intended for the protection of individuals, was the embezzlement by Watson of the money deposited with him, and his failure to account for it, a breach of the bond, or covered by the condition of the bond, and a breach of that condition for which this suit can be maintained?

I.

1st. Was it intended that the bond required by these statutes to be given by the clerk, should be for the benefit and protection of individuals, and one upon which persons other than the United States, might maintain a suit? In determining this question, the general rule must be remembered that only the party named in any bond or other instrument is presumed to have any interest in the obligations incurred. There are a vast number of officials employed by the United States acting under bonds to the government, or to some officer of the government, as its agent, conditioned as this bond is, for the faithful performance of the duties of their offices, and of all this great number there are only a few cases in which the bonds have been held to be intended for the benefit of individuals, and in each of these cases, special provisions of law are made, conferring the right to maintain suits for the breaches, regulating the manner in which suits may be brought, expressly stipulating that in all such suits the government shall be under no liability for the costs, declaring that any judgment recovered in such suit for the penalty of the bond, shall stand open for the use of other parties similarly situated, and providing some limitation within which the suit must be brought. In not a single instance has a recovery ever been permitted upon any bond conditioned

as this bond is conditioned unless such statutory provisions permitted the recovery and governed the proceeding. It is also a well known fact that there are throughout the country an almost innumerable number of officials acting under bonds conditioned for the faithful performance of their offices, executed to the state, or county, or city, or town, or some officer representing the government, and that of this great number very few of the bonds are intended to protect outside persons, but that they are for the benefit of the obligee named only; and, of those few, where they are made for the benefit and protection of individuals, in almost every instance, the statute creates the liability and regulates the enforcement. In a very few instances where the conditions of the bonds are such as to certainly indicate an intention to protect the rights and interests of individuals, it is held that the right of such individuals to sue ought to be inferred and may be inferred. In this case, where there is absolutely nothing indicating any right of any person other than the obligee named in the bond, the United States, to use it for his own benefit, we submit that there is no room for such inference, and we submit that the further fact that in all the history of the government, no recovery has ever been had on any official bond conditioned as this bond is conditioned, unless such recovery is permitted by statute, and that no recovery has ever been had on any official bond of a clerk to the United States, however conditioned, without such permission, withone exception (in *re Finks*, 41 Fed. Rep. 383), is a very pregnant and important fact to be considered in this connection.

2nd. The condition of this bond is antique in its form, and is a relic of days long past, of distant colonial times.

Some of the greatest judges we have ever had have passed upon the meaning of this condition and its scope, in cases arising in different states, and their construction of the meaning and intent of the legislatures in prescribing that condition for the bonds of clerks of the courts, has been that such bonds enured only to the obligee therein named, the government which required them. Such a case was *Crocker v. Fales*, 13 Mass. 262, a very early Massachusetts case, brought upon the bond of the Clerk of the Court of Common Pleas, the condition of the bond being precisely the condition of this bond, and the statute prescribing that bond having been passed in 1786. We have cited from this case quite fully in the original brief, at page 9. And it will appear from an examination of it, that the Massachusetts court at that time, 1816, were of the opinion that under the circumstances of that case, which are precisely the circumstances of this case, it was not the intent of the legislature to "secure to individuals an indemnity for such omissions by the clerk as would be injurious to them."

In the case of *Auditor, etc. v. Dryden*, 3 Leigh, 703, an early Virginia case, President Tucker delivering the opinion, went back to 1705, a period of over 125 years, to consider what was the intention of the legislatures in requiring the bonds of the clerks of the courts in this form. The suit was not the suit of an individual, but of the state. A statute had made it the duty of the clerk to collect certain license taxes and account for them, and the clerk had collected such taxes and failed to account therefor. It was the opinion of this learned judge, that it was the intention of the legislature in requiring this bond to secure indemnity for the state only, for the faithful performance by the clerk of his clerical duties, and not of the duties which had been imposed upon him by

law as a license collector. It is said that this decision has no bearing upon the present case. It is claimed by the defendant in error that the condition for the faithful performance of the clerk's official duty is all-embracing, that it is only necessary to establish some default, and that right of action necessarily follows to the party injured, whether an individual or the government. This case holds that this condition in bonds given by clerks is not all-embracing, but that it has a settled and established meaning, and that this has been the construction given to this language from the earliest times. This rule of decision is destructive to the entire contention of counsel for defendant in error.

In *McCue v. Young*, 10 Wheaton, 406, the opinion was rendered by Mr. Chief Justice Marshall. The suit was on a bond given by the manager of a lottery to the Corporation of Washington, in pursuance of an ordinance, and conditioned truly and impartially to execute the duty vested in him by the ordinance. The manager had failed and refused to pay to the holder the prize drawn by a certain ticket in the lottery, and the suit was brought by McCue in the name of the Corpotation of Washington to his use, to recover the amount of the prize for which the manager had defaulted. Counsel for defendant in error very earnestly contend that this case has no bearing whatever upon the present. The manager of this lottery was exercising a franchise granted to him by the Corporation of Washington, which had proper authority to grant it. The bond was in the nature of an official bond to secure his proper execution of the powers granted. He had failed in the most important particular, but that failure was injurious only to an individual. Chief Justice Marshall, deciding the case, said: "The proprietors of the ticket No. 1037 have shown no right to sue on this bond. Their remedy is certainly against

Gideon Davis; and in the event of his insolvency, it may be against the managers." He further said, "if the proprietors of one prize ticket have an interest in this bond, the proprietors of every other prize ticket had the same interest; and it could not be in the power of the first bold adventurer, who should seize and sue upon it, to appropriate it to his own use and to force the obligees to appear in court as plaintiffs against their own will. No person who is not the proprietor of an obligation can have the legal right to put it in suit unless such right be given by the legislature; and no person can be authorized to use the name of another without his assent given in fact or by legal intendment." The case does decide that in order to create a right of action in an individual upon a bond given to the public authority, conditioned for faithful performance of duties, it is not enough to show a breach of duty injurious to some individual of the public. Such recovery cannot be had by any person other than the obligee, "unless such right be given by the legislature," and there can be no "legal intendment" of such right, arising out of the mere fact of the giving of the bond, the existence of the duty, and the injury of the individual by the breach of that duty. The case is directly and strongly in point, and if it be sound law, completely overthrows the contention of the defendant in error. There are many other similar cases, but we refer to these three because these decisions were rendered by very great judges, whose learning and knowledge of the exact intention of the legislatures in those early days in the use of such forms give great weight to their opinion. We submit, therefore, that the proper construction of these acts of Congress is governed by the very highest authority, and that under these authorities no such meaning can be attributed to them as is claimed.

3rd. The Attorney General of the United States is required to fix the amount of the penalty in these bonds within the prescribed limits. We have seen that the penalty was fixed absolutely from 1789 to 1863 at two thousand dollars by the act of congress. From 1863 to 1875, the penalty was in the discretion of the judge of the court. By the act of 1875 the penalty within prescribed limits is in the discretion of the Attorney General of the United States. The Attorney General of the United States is the official head of its legal department, and has special knowledge of all litigation in which the United States is interested. He has no special knowledge, by virtue of his office, of the general litigation pending in the courts. He knows no more than any other individual lawyer in Washington, or any remote city, about the nature and extent of litigation, other than that of the United States, pending, or liable to be pending, in any court in Missouri. If this bond was intended merely for the protection and security of the government of the United States, the Attorney General is the proper officer to fix the penalty of the bond. If it was intended to cover other liabilities in which the United States has no interest, and in favor of individuals, the Attorney General is a most improper person to discharge that duty. The judge of the court of which the clerk is clerk is the person who alone could properly determine the amount of bond required to secure individual litigants. The fact that this authority is given to the Attorney General is a most significant one, and ought to be conclusive in the absence of any other circumstance to the contrary, that the intent of the legislature was to secure only liabilities in favor of the United States.

4th. The penalty of the bond, up to its highest limit, is no more than sufficient to furnish adequate security to the United States against defaults of the clerk. In some of the courts, especially some of the district courts, the interest of the United States in the security of moneys deposited in court, is very large, and also in the faithful performance by the clerks of their other official duties, besides the payment of money. On the other hand, the bond of the clerk, up to its highest extreme limit of twenty thousand or forty thousand dollars, is utterly insufficient to protect the interests of individuals litigant in the courts. The history of these statutes must be remembered. Up to 1863, the highest bond that could be required of a clerk was two thousand dollars. It would be absurd to suppose that the congress of the United States intended by a penalty of two thousand dollars to protect the interests of individual suitors in the courts. It is equally absurd to-day to suppose that they have any such intention when the limit of the bond is twenty thousand or forty thousand dollars. In great railroad foreclosure cases, now frequent in some of our courts, vast amounts are required to be deposited in court for the payment of expenses, fees and costs, and where bond-holders became purchasers, and are permitted to use, to some extent, their bonds in payment of the purchase price of the property foreclosed, it is also necessary that large amounts should be deposited in court for the benefit of minority bond-holders who do not enter into the reorganization schemes, and hundreds of thousands of dollars in single cases are frequently deposited in this way. Other large deposits are constantly made. And the bond of twenty thousand or forty thousand dollars is often insufficient to cover one per cent of the liability for moneys on deposit in a single case.

If it be true that congress intends by a bond so insignificant under the circumstances, to protect individual liabilities, then congress has in many cases provided for the protection of individuals to the extent of less than one per cent, and left them unprotected to the extent of more than ninety-nine per cent. Indeed it would seem to be an impossibility to provide by an adequate bond for the protection and security of individuals in such cases, as the bond required would be too great in amount for any ordinary clerk to give, and the expenses of giving such bond would not be justified by the salaries allowed to clerks.

5th.—Congress has made other adequate, complete and effectual provision for the protection and security of all suitors in courts of the United States, and this from a very early day.

By an act of Congress, approved April 8, 1814, 3 Stats. L. 127, it was provided: "That upon the payment of any money into any district or circuit court of the United States to abide the order of the court, the same shall be deposited in such incorporated bank as the court may designate, and there remain, until it shall be decided to whom it of right belongs; provided that if, in any judicial district, there shall be no incorporated bank, the court may direct such money to be deposited according to its discretion. *Provided*, also, that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties under the direction of the court"

By act of March 3rd, 1817, 3 Stats. L. 395, it was provided: "That it shall be the *duty of the judges* of the circuit and district courts of the United States, within sixty days from and after the passing of this act, in all districts in which a branch of the Bank of the United States is or shall be established, to cause and direct all moneys remaining in said courts respectively, to be deposited in such bank, in the name and to the credit of the court, and a certificate thereof from the cashier of said bank stating the amount and time of said

deposit to be transmitted, within twenty days thereafter, to the Secretary of the Treasury; and, in districts in which no such branch bank is or shall be established, such deposits may be made in like manner and within the same time in some incorporated state bank within the district, in the name and to the credit of the court.

Sec. 2. That all moneys which shall hereafter be paid into said courts or received by the officers thereof, in causes pending therein, shall be immediately deposited in the branch bank within the district, if there be one, and otherwise, in some incorporated state bank within the district, in the name and to the credit of the court.

Sec. 3. That no money deposited as aforesaid shall be drawn from said bank except by the order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk, and, every such order, shall state the cause in or on account of which it is drawn.

Sec. 4. That if any clerk of such court or other officer thereof, having received any such money as aforesaid, shall refuse or neglect to obey the order of such court for depositing the same as aforesaid, such clerk or officer shall be forthwith proceeded against by attachment for contempt.

Sec. 5. That at each regular and stated session of said courts, the clerks thereof shall present an account to said court of all moneys remaining therein, or subject to the order thereof, stating particularly on account of what causes said moneys are deposited, which account, and the vouchers therefor, shall be filed in court. *Provided, nevertheless*, that if in any district there shall be no branch bank of the United States, nor any incorporated state bank, the court may direct such moneys to be deposited according to their discretion."

These two acts were specially repealed by the act of March 24, 1871, 17 Stats. L. p. 1, which was as follows:

"That all moneys in the registry of any court of the United States, or in the hands or under the control of an officer of such court which were received in any cause pending or adjudicated in such court shall within thirty days after the passage of this act be deposited with the treasurer, an

assistant treasurer, or a designated depositary of the United States, in the name and to the credit of such court. And all such moneys which are hereafter paid into such courts, or received by the officers thereof, shall be forthwith deposited in like manner; provided, that nothing herein shall be construed to prevent the delivery of any such money upon security according to agreement of parties, under the direction of the court.

Sec. 2. That no money deposited as aforesaid shall be withdrawn, except by order of the judge or judges of said courts respectively, in term or in vacation, to be signed by such judge or judges, and to be entered and certified of record by the clerk, and every such order shall state the cause in or on account of which it is drawn.

Sec. 3. That at every regular or stated session of said courts, the clerks thereof shall present an account to said courts of all moneys remaining therein or subject to the order thereof, stating in detail in what causes said moneys are deposited and in what causes payments have been made, which accounts and vouchers thereof shall be filed in court.

Sec 4. That if any clerk or other officer of a court of the United States shall deposit any money belonging in the registry of the court in violation of this act, or shall retain or convert any such money to his own use, or to the use of any other person, he shall be deemed guilty of embezzlement, and on conviction shall be punished by a fine of not less than five hundred dollars and not more than the amount embezzled, or by imprisonment for a term of not less than one year nor more than ten years, or both, at the discretion of the court.

Sec. 5. That if any person shall knowingly receive from a clerk or other officer of a court of the United States, any money belonging in the registry of said court as a deposit, loan or otherwise, in violation of this act, he shall be deemed guilty of embezzlement, and shall be punished as provided in the last preceding section.

Sec 6. That the act entitled 'An Act directing the disposition of money paid into courts of the United States,' approved April 18, 1814, and the act supplementary thereto, approved March 3rd, 1817, be, and the same are hereby repealed."

The only changes in the law as prescribed by this last statute are those wrought by the revision of the statutes. Section 1 of the act has become Section 995 of the present Revised Statutes, and has been changed by striking out all that part of the section requiring all moneys at that time in the registry of the courts to be deposited with the treasurer, assistant treasurer or depositary within thirty days, and otherwise the section is unchanged. Section 2 of the act is now Section 996 of the revised Statutes. Section 3 of the act is now Section 798 of the Revised Statutes. Section 4 and 5 of the act are sections 5504, somewhat amended, and 5505 of the Revised Statutes.

We call especial attention to these provisions of the statutes, not only for the purpose for which we here cite them, as affording the necessary protection to individual suitors in the courts, but also because counsel for defendant in error claim to find in these same statutes authority expressed and implied for the handling of moneys paid into court by the clerks. We here see that these provisions were first enacted by Congress in 1814, and in 1817, and remained in force until 1871, as so enacted, and that during all that period, up to the year 1863, the penalty of the clerk's bond was at all times two thousand dollars. It must also be noticed that the strenuous and almost severe language of the act of 1817, directed to the judges of the court to see to it that all moneys on deposit in the court, should be within the short time stated, placed in a safe depositary, and requiring the judges to punish for contempt any failure of a clerk to obey the orders of the court requiring such deposit, implies very strongly that wrongs and abuses were in existence which required a summary and decisive remedy. Unquestionably, the act of 1814 had not been obeyed, and the clerks

had loaned the moneys committed to their charge and distributed it among their friends in the manner that so many public officials have been in the habit of doing with similar money, and that losses had thereby occurred which were scandalous to the administration of justice, and therefore, this act was directed to the judges of the several courts, requiring them to take the matter in hand, and see that the law was obeyed and enforced and that suitors in the courts have proper protection and security. In 1871, it appears from the form of the act then passed that this law had not been fully obeyed. We are told that "for more than a century the clerks of the circuit courts of the United States have been receiving and paying out the moneys of suitors in those courts in the usual and customary manner"—that is, that the clerks, as clerks, had received the money, and kept it, and paid it out, while the law had directed, during almost the entire period, that it should be received, kept and paid out in an entirely different manner; but the first section of the act of 1871 would seem to recognize the fact that there were in the hands or under the control of some officers of the court, moneys which were received in causes pending or adjudicated therein. This could only be so by reason of disobedience to the existing law. Section 4, the penal section of the act, can only have application to such cases as that. The money then in the registry of the court and deposited in the incorporated bank, could only be drawn by the order of the judge, and no clerk could, by any possibility, deposit any of those moneys in violation of the act, or convert them to his own use or to the use of any other person. The security furnished for individual suitors, by these laws, rendered any embezzlement or misuse of moneys paid into court an absolute impossibility. Under these acts, the money cannot be placed

in a depositary without an order of the court designating what depositary it shall be placed in, whether the treasurer or an assistant treasurer of the United States, or some one of the many authorized depositaries in each district. The clerk has no power whatever to make this judicial selection. He cannot pay the money to any depositary until this order is made. It is suggested that there must be some time between the actual payment into court and the arrival of the money at the depositary, and that the duty of taking the money to the depositary may be properly and legally entrusted to the clerk. The law provides that it shall be *forthwith* placed in the depositary. An order of the court is necessary selecting the depositary and directing this act. There is no interval of time between the bringing of the money into court and the making of this order. The money never is paid into court and never can be until such order is made. There is no authority of law for handing the money to the clerk and leaving it with him until the proper order is secured. When that order is made, we submit that it is the duty of the judge to see to it that the money is placed in the depositary. He may take the risk of sending it either by the marshal or the clerk, or any other person whom he may see fit to trust with it, but in the contemplation of law, the money goes forthwith, instantly, from the presence of the court into the designated depositary. The proper certificate of deposit "*in the name and to the credit of the court*" is delivered to the court and the money from the moment of its payment into court is in contemplation of law, safe from any misfeasance of the clerk or of any other officer of the court. This security is ample. The treasurer of the United States is responsible for all the millions that may ever be involved in any litigation. The responsibility of the selected depositaries is presumed to

be ample. The provisions of the law are complete and perfect. All that is required is that the judges should do their duty. The parties litigant and interested in the deposit of moneys have full opportunity to see that the money comes safely into the depositary. In fact, the better practice, and one that has been frequently employed, is, when application is made to pay money into court, to make an order directing the parties to pay the money into the selected depositary and return the certificate in the name and to the credit of the court, to the court, and thereupon to make the order stating that the money is paid into court, and the purpose of it. As compared with any bond that might be exacted, this security is of far higher character. It does not in the least impair our argument, to say that, by the neglect of the court and the carelessness of the parties, and their failure to see to it that the money which they attempt to pay into court, is actually paid in, may be lost. The United States has never undertaken to guarantee parties litigant against their own ignorance and carelessness, or the mistakes or neglects of the courts.

That the security of the clerk's bond is an amount barely sufficient to protect the interests of the obligee, the United States; that it is utterly insufficient to protect the suitors litigant in the courts; that, if it be held that individuals have the right to use it for their own protection, the security of the government may be impaired or destroyed; that Congress has provided thorough, ample and sufficient security for the litigants in all possible cases, would seem to be considerations that ought to have great weight in determining this question.

II.

In re Finks.

The case *in re Finks*, 41 Fed. Rep., 387, has been so often cited and commented on by counsel for defendant in error and by the courts below in their decisions, and it seems to be regarded as so high and persuasive as authority that it demands our special attention. It is also the only case in which the sureties of a clerk of a court of the United States have been held liable, except to the United States; and it is also the only case in which sureties have ever been held under similar circumstances. But it is a "bad eminence" to which this case is thus exalted. The decision evinces complete ignorance of the statute prescribing the terms and form of the bonds of clerks. It says:

> "It is one of the conditions of the official bond of the clerk to properly account for all money coming to his hands as required by law, and he having failed to do so in this case, the court is of the opinion that the sureties on his official bond are bound for the deficit."

It never was the condition of any official bond of a clerk that he should properly account for moneys. Any bond containing that condition was not an official bond. It may have been a common law bond, and it may as such have been valid and imposed liability in favor of individuals, but, whatever construction is placed upon it, is not a construction either of the bond or the statute now under consideration.

III.

The plaintiffs in error also contend that even if the law permitted individuals to make use of this bond for their own protection, and it was intended for the protection of individ-

uals, still no breach of the condition of this bond is shown either in the complaint in the case, or in the facts of the case as found by the court below. The statement in the complaint is, (Rec. 3-4): "Thereafter on the day of March, 1891, said Henry County did deposit with said Warren Watson, as clerk of this court, under and pursuant to an order of said court to that effect, the sum of $2525." The entry upon the court record was as follows: "This day comes defendant, by its attorney and files answer and tenders to the plaintiff and deposits with the clerk the sum of $2525 in payment and satisfaction of his cause of action in the petition set forth. Thereupon, a stipulation waiving a trial by jury is filed herein." (Rec. 13). It has already been stated that this sum of $2525 was a tender previously made to Stewart at the Bank of Commerce in New York. The judgment rendered by the court in the case was for the sum os $2525, and costs were adjudged against the plaintiff, the tender being held good. It is necessary to determine what was the legal significance and effect of this act. We contend:

(1st.) That it was not *a payment of money into court.* The general rule is that to constitute payment into court, it must be done under a special rule or order of court. On this subject several authorities are cited in our original brief. There is no method known to the law whereby payment can be made unless the thing paid be accepted by the party opposite, except by payment into court. A debtor can tender and offer to make payment, but unless the tender be accepted there is no payment, and no power to compel acceptance; but when the creditor brings his debtor into court and asks judgment for his debt, the debtor may then bring into court any sum

of money which he sees fit, and pay it into court, although it be less than the amount demanded, the court will receive that payment, and the creditor cannot refuse it. Whether he takes the money or not, it stands as a payment *pro tanto* on his debt. Now to accomplish this, a special order of the court is and always has been necessary. That special order is to the effect that the defendant comes and pays the money into court for the use of the plaintiff in the case, and grants to the plaintiff proper time to determine whether he will accept it and desist from his suit. If he does accept it, the costs are taxed against the defendant, and he is required to pay them, and the plaintiff receives his money. If he does not see fit to desist from his suit, he may still take the money, and the amount so paid to him is stricken from his declaration and he is allowed to proceed for the remainder claimed. If he fails to show a debt larger than the amount paid, judgment goes against him and for the defendant. In this manner, and in this manner only, can the money paid into court become the money of the opposite party. It does not happen, however, that in all cases, the party for whose benefit the money is paid, is entitled to receive it immediately. It may be that the plaintiff in the case may hold securities for the debt, which the defendant is entitled to receive upon its payment, and the order of the court will then be that, upon his depositing those securities for the use of the defendant, he is to take the money out of court. There are many other cases in which the right of a party to receive money paid into court for his benefit is subject to conditions. A clerk cannot be the judge in these matters. It is not left to him to say whether the party for whose benefit the money is deposited is to take it unconditionally or upon the performance of some condition. It is for this reason that it is held

that to constitute payment into court a special order to that effect is necessary. No such order was made by the court in this case. If it be the law that to make good a tender the amount tendered must be paid into court, it certainly was not done in this instance. This is the rule regarding payment into court without reference to the statutes which have been cited governing payment into court. Under these statutes, in order to constitute payment into court, there must also be an order naming the depositary and placing the money in that depositary. The statute absolutely requires that such an order is necessary to constitute the act of paying money into court. If this view is correct, there can be no liability in favor of Stewart upon this bond, for the reason that the money deposited never became his money. More than this, Stewart took judgment and the court gave judgment in his favor against Henry county for $2525. He is estopped from saying that the $2525 deposited with Warren Watson was his money, by this judgment. The judgment may have been wrong, but it was taken by the plaintiff and at his instance, and stands as the judgment of the court. Stewart cannot be permitted now to say that this $2525 had already been paid to him by the deposit in the hands of the clerk after having taken judgment against Henry county for the sum.

2d. It is suggested that this deposit was made pursuant to a statute of the State of Missouri, and that under the statute of the State of Missouri, the clerk of the United States Court is authorized to receive tender money in such cases where, but for such statute, he would have had no such right. If the statute of Missouri could have any force in this case, the deposit made did not comply with it. The law referred to is Sec. 2937, Rev. Stats. of Missouri, 1889, and is

as follows: "In all actions where, before suit brought, tender shall be made and full payment offered by discount or otherwise, in such specie, and at such time and place, as the party by contract or agreement ought to do, and the thing tendered, if in money, *shall be deposited in court*, but if not money, committed under an order of court to the sheriff or other officer of court for the use of the plaintiff before the trial of the case shall commence, and the party to whom such tender shall be made doth refuse the same, and yet afterwards will sue for the debt or property so tendered, the plaintiff shall not recover any costs in such suit, but *the defendant shall recover costs* as if the judgment in the case had gone in his favor upon the merits." Now, it must be noticed that in order to relieve the defendant from costs by depositing the money tendered in a case where there has been a prior tender, the statute is that the money must be "deposited in court" "for the use of the plaintiff," so that under the statute, as by the general rule outside of the statute, in order to save himself from costs, the party must pay the money into court. In the case at bar there had been a prior tender. But it must be also noticed that under this statute, the party may relieve himself from all costs in the suit by paying the money into court "*before the trial of the case shall commence*." It is not necessary to deposit the money with the clerk in order to keep the tender good. When the case comes up for final trial, if he produce the money in court before the trial is commenced, and if a good prior tender is shown, the party is relieved from all costs in the case. A more complete answer to this suggestion is that the only effect of this statutory provision is to regulate the matter of costs, and as we have fully shown in our original brief, the matter of costs is entirely regulated by a law of congress, and any at-

tempt to do so by State statutes can have no effect in United States courts. Another Missouri statute which has been quoted here is Sec. 2939, and is as follows:

"*Tender in court after suit brought. When plaintiff shall pay all costs from the time of such tender.* If in any suit pending, the defendant shall at any time deposit with the clerk for the use of the plaintiff the amount of the debt or damages he admits to be due together with all costs then accrued, and the plaintiff shall refuse to accept the same in discharge of his suit, and shall not afterwards recover a larger sum for his debt or damage due, and costs accrued up to the time of deposit, than the sum so deposited, he shall pay all costs that may accrue from and after the time such money was so deposited as aforesaid."

It will be seen that this provision applied only to cases of tender in court where there has been no prior tender, and that it is also a statute regulating costs. There is a further provision of the Missouri statutes that a defendant may plead and show tender at any time prior to suit brought, and without depositing the money with the court or clerk, and if he proves a good tender on the trial, the plaintiff can recover no intetest after the time of such tender. In no possible view of the case can the Missouri Statutes be held to confer authority on the clerk of the United States court to accept and hold the deposit made in this case. What, then, was its effect? It was simply a voluntary act on the part of Henry county depositing this sum of money in the hands of Warren Watson, the clerk, which it might just as well have kept in its own hands or have deposited elsewhere. The act had no legal significance. The clerk could not have taken the money in his official capacity as clerk, because his official capacity only extends to the discharge of the duties of his office. It is no more a part of the duties of his office to take and hold

this money than it would be to take and hold the money of parties to a case litigant in his court for the purpose of paying their attorney fees, or of paying for such judgment as might be rendered against them in the case.

IV.

A question was suggested in the brief of counsel for defendant in error as to the jurisdiction of this court in this case. Upon the argument the objection was urged somewhat more confidently. There ought to be no question as to the jurisdiction in this case.

The writ of error from this court to the Circuit Court of Appeals is a matterof right in all cases where the judgments of the Court of Appeals are not made final, and the matter in controversy exceeds two thousand dollars. The judgments of the Court of Appeals are made final only i i cases where the jurisdiction (of the Circuit Court) is dependent entirely upon diversity of citizenship.

In this case diversity of citizenship of the parties is alleged for the purpose of invoking the jurisdiction of the Circuit Court of the United States, but it appears upon the face of the petition that the plaintiff's cause of action arises upon a bond executed by defendants as securities, for a Clerk of the United States Circuit Court, an office created by the laws of the United States, and a bond being given in pursuance of a statute of the United States prescribing its form and all its various details.

If, as is contended by plaintiffs in error, these statutes of the United States did not create the liability claimed in the petition, the question raised in this case might have well been raised by demurrer to the petition. It appeared

clearly and unmistakeably upon the face of the petition that the case necessarily involved the construction of the statutes of the United States, and this is sufficient.

In *Sonnentheil v. Christian Moerlein Brewing Company*, 172 U. S. 401, a suit had been brought in the circuit court, where a verdict was rendered for the defendants, and the case taken by appeal to the Circuit Court of Appeals, and the judgment of circuit court affirmed. Thereupon the plaintiff sued out a writ of error from this court to the Circuit Court of Appeals, and the jurisdiction of this court in the case was challenged. The Court said:

"In this case the plaintiff Sonnentheil was a citizen of the state of Texas; the defendant Brewing Company was a corporation created by the laws of Ohio, and a citizen of that state; and Dickerson a citizen of the state of Texas; but it also appeared upon the face of the original petition that Dickerson was marshal of the United States for the Eastern Division of Texas, and that he made the seizure of the goods in question through his deputy John H. Whalen, and under a writ of attachment sued out by the Brewing Company against Freiberg, Klein & Co. as defendants. It thus appears that the jurisdiction of the circuit court did not depend entirely upon diversity of citizenship between the plaintiff and the Brewing Company. * * * Had the jurisdiction of the circuit court been originally invoked solely upon the ground of diversity of citizenship, the case would have fallen within the *Colorado Central Mining Company v. Turck*, 150 U.S. 138, but as the original petition declared against Dickerson as marshal, for an official act as such, that case has no application."

In *Auten v. United States National Bank*, 174 U. S., 125, the case was in error to the Circuit Court of Appeals. This court said:

"To sustain the motion to dismiss, it was contended that the jurisdiction of the case depends on diversity of citizenship, and hence that the judgment of the Circuit Court of Appeals is final, but one of the defendants (plaintiff in error)

though a citizen of a different state from the plaintiff in the action (defendant in error) is also a receiver of a national bank, appointed by the Comptroller of the Currency, and is an officer of the United States, and an action against him is one arising under the laws of the United States. *Kennedy v. Gibson*, 8 Wall. 498; *in re Chetwood*, 165 U. S. 443; *Sonnentheil v. Christian Moerlein Brewing Co.*, 172 U. S., 401. It is, however, urged that such an appointment was not shown. It was not explicitly alleged, but we think that it sufficiently appearedand the motion to dismiss is denied."

See also Pacific Railroad Removal Cases, 115 U. S., 1.

In concluding, we wish to suggest the important consequence of a decision holding that this bond, conditioned for the faithful performance of the official duties of the clerk, can be sued on by any other party than the United States. If that is to be the law, there is no reason why the rule should not be applied to all similar bonds given to the government; and if that rule is to be applied to all such bonds given to the United States, there is no reason why it should not apply to bonds given to states and municipalities. The reasons we have given why the intendment claimed should not be permitted in this case, do not exist in the cases of other officers. No provision whatever has been devised by Congress for the protection of individuals from injuries received by misfeasance in office of postmasters, mail carriers, collectors, or any other officers who give similar bonds. The only safe rule to apply is, that, unless there is in the form of the bond or the statute prescribing it, direct permission or clear legal intendment, amounting to permission to the individual to sue, no such suit can be maintained.

Respectfully submitted,

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